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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Carriers regularly file with the Interstate Commerce Commission new tariffs representing millions of dollars in revenues. In the past, the Commission examined new tariff sheets prior to their taking effect to ensure that they met formal requirements. If a tariff sheet did not, the Commission rejected the tariff prior to its effective date, allowing the carrier to publish and refile a corrected tariff. The courts of appeals have previously held that the ICC—and similar agencies—may not exercise rejection powers over a tariff *after* it has become effective. * And this Court has held that an effective tariff rate may not be treated as non-existent because of a carrier's failure to comply with some tariff filing formality, thereby rendering the carrier strictly liable to refund to shippers freight charges they have paid, without regard to whether the shippers have suffered any actual harm. **

Against this background, the questions presented by this case are as follows:

1. Whether, contrary to prior decisions of the Courts of Appeals for the District of Columbia and Eleventh Circuits, the court below erroneously concluded that the Interstate Commerce Commission may reject retroactively tariff rate increases that have become fully effective in accordance with the Interstate Commerce Act's provisions but that are subsequently found not to

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* *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 676 F.2d 1374 (11th Cir. 1982); *Delta Air Lines, Inc.* v. *CAB*, 543 F.2d 247 (D.C. Cir. 1976).

** *Davis* v. *Portland Seed Co.*, 264 U.S. 403 (1924); *Berwind-White Coal Mining Co.* v. *Chicago & E.R.R.*, 235 U.S. 371 (1914).

bear technical symbols prescribed by Commission regulation.

2. Whether, in disregard of controlling decisions of this Court, the court below erroneously concluded that the Interstate Commerce Commission may treat an effective but missymbolized tariff rate increase as though it never existed and obligate carriers to refund the full amount of the increase to shippers without any showing that the shippers have suffered any actual harm. ***

*** In addition to the parties named in the caption, the other parties to the proceeding in the court below were the railroads of the United States listed in Appendix A and the National Motor Freight Traffic Association, Inc. Appendix A also contains a listing of parent companies, subsidiaries, and affiliates.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, the railroads of the United States listed in Appendix A ("the petitioners"),[1] request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, which is reported at 682 F.2d 1092, appears as Appendix B. It sustained a new Interstate Commerce Commission regulation that was adopted by a Commission decision and order dated August 14, 1980, which is reported at 364 I.C.C. 217 and appears as Appendix C, and a Commission decision and order dated June 10, 1981, which is reported at 365 I.C.C.

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[1] The appendices, which are printed in a separate volume, are cited as "Pet. App. ____."

43 and appears as Appendix D. The Commission's new regulation was initially proposed in a notice of proposed rulemaking entered October 9, 1979, which is published at 44 Fed. Reg. 60122 and appears in Appendix E.

JURISDICTION

The judgment of the Court of Appeals, which was entered August 9, 1982, appears as Appendix F. An order of the Court of Appeals denying both rehearing and rehearing *en banc* on the basis of a timely suggestion for rehearing *en banc*, which order was entered September 22, 1982, appears as Appendix G. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Interstate Commerce Act appear as Appendix H. Pertinent provisions of the Code of Federal Regulations appear as Appendix I. The proposed ICC regulation at issue in this case appears as Appendix J.

STATEMENT OF THE CASE

Each year carriers publish and file thousands of tariffs setting forth new and changed rates for transportation service. The Interstate Commerce Act ("the Act") specifically prescribes the steps by which a carrier may implement a new or changed tariff rate. See 49 U.S.C. § 10762. This case involves an attempt by the Interstate Commerce Commission ("the ICC" or "the Commission") through regulation to exercise authority that it has not been granted over published tariff rates and to penalize carriers severely for failing to comply with one of the many technical requirements set forth in the ICC's own detailed tariff publication rules.

A. Carrier Tariff Filings and Past ICC Practice

Under the Act, carriers must file with the Commission tariffs setting forth their rates for transportation service.[2] Carriers must adhere strictly to their published rates so long as they remain in effect.[3] To change a tariff rate, carriers must file and send to tariff subscribers notice of the proposed change and its effective date.[4]

In addition to the Act's requirements, extraordinarily complex and detailed ICC regulations govern the publication and dissemination of tariffs. These regulations for rail freight tariffs alone take up almost seventy pages of the Code of Federal Regulations,[5] prescribing such details as the type of paper on which tariffs may be printed and the permissible width of columns appearing on a tariff page.[6] One of these regulations requires that any change reflected in a new tariff sheet be flagged by a designated symbol that indicates either a rate reduction or a rate increase or no change in the existing rate.[7]

From time to time, errors do occur in publishing tariffs so that a new tariff sheet may not always comply in every

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[2] See 49 U.S.C. § 10762(a).

[3] See, *e.g.*, *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520-21 (1939); *Louisville & N.R.R.* v. *Maxwell*, 237 U.S. 94, 97-98 (1915).

[4] See 49 U.S.C. § 10762(c); 49 C.F.R. § 1300.30.

[5] See 49 C.F.R. § 1300.0, *et seq.*

[6] See 49 C.F.R. § 1300.1.

[7] See 49 C.F.R. § 1300.2(a). The regulation specifies that a diamond symbol shall be used to indicate an increase, a teardrop symbol to indicate a reduction, and a pyramid symbol to indicate no net change. *Id.*

detail with the Commission's numerous regulations, even though it sets forth a proposed rate change with perfect clarity. The Act permits the Commission to reject a proposed new tariff filing prior to its effective date where the tariff sheet contains some defect such as a typographical error or a missymbolization of a rate change.[8] Tariff rejection has generally been considered " 'a peremptory form of response to filed tariffs' " that is appropriately used to call "on the filing party to put its papers in proper form and order."[9] Historically, the Commission maintained a staff of tariff examiners who reviewed each new tariff sheet prior to its effective date; if some defect was discovered, the Commission rejected the tariff before it took effect, and ordinarily the carrier could then file a corrected tariff without suffering any significant adverse consequences.

In the event that a clerical or typographical error—such as missymbolization of a rate change—was discovered only after a tariff had become effective, the Commission's traditional practice was to advise the carrier of the error so that a corrected tariff could be published and filed, and to encourage the carrier to exercise all possible care in the future.[10] The Commission did not attempt to reject or otherwise to strike summarily effective tariffs containing technical defects; and it certainly did not at-

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[8] See 49 U.S.C. § 10762(e).

[9] *Municipal Light Boards* v. *FPC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); accord, *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 676 F.2d 1374, 1378 (11th Cir. 1982).

[10] See Joint Brief of the ICC and the United States in the court below, served November 6, 1981, at 6.

tempt to penalize carriers for inevitable clerical and typographical errors by making them refund to shippers rate increases collected under tariffs that were not necessarily perfect in every technical detail. To the contrary, the Commission has long recognized that it lacks authority to reject an effective tariff, and that a rate contained in an effective tariff must be observed unless it is shown to involve some substantive violation of the Act's provisions.[11]

Congress has specifically defined elsewhere in the Act the scope of the Commission's authority to overturn effective tariff rates. Thus, Section 10704 of the Act authorizes the Commission, on its own initiative or on complaint, to investigate any existing rate and to determine whether the rate is unreasonable or otherwise violates any other provision of the Act.[12] If, after investigation and a full hearing, the Commission finds an existing rate to be unlawful, it "may prescribe the rate . . . to be followed" in the future. 49 U.S.C. § 10704(a)(1).[13]

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[11] See, *e.g.*, *Phillips Petroleum Co.* v. *Akron, C. & Y. R.R.*, 308 I.C.C. 257, 260 (1959); *Heavy and Spec. Carriers Tariff Bureau* v. *U.S.A.C. Transport, Inc.*, 302 I.C.C. 487, 488 (1957); *Lamb-Fish Lumber Co.* v. *Yazoo & M.V.R.R.*, 42 I.C.C. 470, 471 (1916).

[12] See 49 U.S.C. § 11704(a)(1), (f).

[13] The Act also expressly restricts the Commission's authority to declare a rate unlawful. If a carrier does not possess "market dominance"—that is, if it faces effective competition from other carriers or other modes—with respect to the transportation to which the rate applies, the Commission may not set aside the rate as unreasonably high. See 49 U.S.C. 10709. And, even when market dominance does exist, the Act prescribes a range within which carriers may raise rates without challenge by either the Commission or private parties. See 49 U.S.C. § 10707a. Congress, in short, has not given the Commission unrestricted authority to set aside carriers' rates.

B. The ICC's New Tariff Regulation

While the ICC has long considered its authority to reject a tariff for some technical defect to be at an end once the tariff has become effective, in October 1979 the Commission issued a notice of proposed rulemaking that reflected a major change in its view of its authority over effective tariff rates. Pet. App. 5e-7e. The notice proposed a new tariff regulation that would provide that: "Changes resulting in increases which are not identified by proper symbols shall be considered unlawfully published and filed and therefore invalid and not collectible." Pet. App. 19e.[14] The notice acknowledged that the purpose of this new regulation was to render missymbolized rate increases invalid and uncollectible, "notwithstanding the passing of the purported effective date" of the increases. Pet. App. 7e. Thus, the Commission was asserting for the first time authority to reject a tariff rate increase for a purely technical defect of form—missymbolization—even after the increase had become effective.

In addition, the Commission's proposed regulation provided that in the case of a missymbolized rate increase,

> "the lawful provisions will be those which were purportedly superseded. Invalid provisions shall be cancelled by publication which shall bring forward, or properly amend, provisions which have remained in effect by reason of invalid publication." Pet. App. 19e.

The Commission thus sought to dictate that a missymbolized rate increase—even if entirely reasonable and nondiscriminatory as a substantive matter—should be

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[14] The notice also proposed a number of other new tariff publication regulations; these additional regulations are not at issue in this case.

treated as a nullity and that the applicable rate for all time should be the rate that was superseded. By so doing, the Commission intended to enable shippers to recover the full amount of any missymbolized rate increase, without regard to whether shippers had suffered any actual harm. Pet. App. 6e-7e.

In the notice, the Commission acknowledged that its proposed regulation represented "a departure from numerous Commission *and* court decisions in the past." Pet. App. 6e (emphasis added). The notice explained that because the Commission wished to "reallocate its resources," it planned shortly to reduce its tariff examination staff and "to review tariff filings on a random sampling basis only." Pet. App. 6e. The notice sought to justify the proposed regulation on the ground that "some tariff deficiencies previously discovered by the full complement of tariff examiners" might not be caught under the new "sampling net." Pet. App. 6e.[15]

After receiving comments, the Commission adopted the proposed regulation without change in an order dated August 14, 1980. Pet. App. 10c-16c. The Commission's order also acknowledged that the new regulation constituted a departure from past treatment of effective tariff rates. Pet. App. 10c-11c. Nonetheless, the Commission asserted that it had authority to issue the regulation under Section 10762 of the Act, 49 U.S.C. § 10762. See Pet. App. 33c. The Commission also reaffirmed its intent

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[15] The Commission asserted that "it would be inappropriate" to place the burden of checking new tariff filings for changes on tariff users (Pet. App. 6e), although tariff subscribers would certainly have notice that changes had been made by virtue of receiving new proposed tariff sheets (see p. 3, above).

that, when a rate increase is missymbolized, shippers are to be allowed to recover the full amount of the rate increase. Pet. App. 13c-14c. And the Commission made clear that such a refund claim could be brought as long as three years after the claim first accrues. Pet. App. 14c; see 49 U.S.C. § 11706(b).

The Commission's order also rejected suggestions that the new regulation, if adopted, should apply to rate reductions as well as to rate increases. Pet. App. 15c. Thus, the new regulation would operate only against carriers and never in their favor—missymbolized increases are to be deemed invalid, but missymbolized reductions are not.[16]

C. The Court of Appeals Proceedings

On petitions for review, the Court of Appeals for the Fifth Circuit sustained the ICC's new regulation invalidating missymbolized tariff increases.[17] The Court of Appeals rejected the argument that the Commission has no authority under Section 10762—whether by regulation or otherwise—to reject a tariff after it has taken effect. Noting that the symbolization requirement concerns "the form in which a tariff must be published and filed," the Court observed that "rejection is the remedy that agen-

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[16] The petitioners sought reconsideration of the Commission's decision to adopt the new regulation. By order dated June 10, 1981, the Commission summarily reaffirmed its action. Pet. App. 4d.

[17] The Court of Appeals' jurisdiction was invoked under 28 U.S.C. §§ 2321, 2342 & 2344.

cies commonly are empowered to use against tariff filings that are obviously 'defective in form.' " Pet. App. 9b. The court failed to perceive any limitation on the Commission's tariff rejection under Section 10762 (Pet. App. 10b), despite the fact that the ICC's authority over effective tariff rates is defined in a separate portion of the Act (see p. 5, above).

The Court of Appeals also held that the Commission could invalidate retroactively missymbolized rate increases that may be entirely reasonable as a substantive matter. Pet. App. 11b-20b. This step would render carriers strictly liable to shippers for refund claims in the full amount of the increases, without regard to whether the shippers had suffered any actual harm. The court acknowledged that this new rule of retroactive invalidity and strict liability "moves away from an impressive list of prior decisions by the Commission." Pet. App. 12b. But the court concluded that Section 10762 gives the ICC sufficient authority to adopt the new regulation. Pet. App. 15b, 24b.[18]

REASONS FOR GRANTING THE WRIT

The decision below, sustaining the ICC's new missymbolization regulation, conflicts with decisions of both

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[18] The Court of Appeals also held that the Commission's promulgation of the new regulation was neither arbitrary nor capricious. Pet. App. 20b-24b. The court recognized that the new regulation could impose an extremely harsh penalty on carriers—the refund of up to three years of revenues collected on the basis of an entirely reasonable rate increase—for a purely technical defect, namely, missymbolization of the tariff setting forth the increase. Yet, it dismissed this point with the assertion that such "problems reflect severity . . ., not caprice." Pet. App. 23b.

other courts of appeals and this Court. Until the Fifth Circuit's decision in this case, the courts of appeals had consistently held that the power to reject tariffs does not extend to *effective* tariffs; only recently, the Eleventh Circuit—contrary to the decision below—struck down on this basis another ICC tariff regulation that was a precursor of the regulation at issue here. In addition, this Court ruled long ago that an effective tariff cannot be treated as a nullity, and shippers allowed to reap windfall recoveries without regard to actual harm, because of purely technical defects in the tariff or the filing process.

These direct conflicts alone are sufficient to warrant plenary review by this Court. Furthermore, the questions presented by this case are of large and far-reaching importance. Carriers and shippers alike depend upon the reliability of tariffs that have been filed and become effective in accordance with the Act's express provisions. Carriers file thousands of tariff changes annually; and a single rate increase can represent millions of dollars in freight charges to shippers and revenues to carriers. The ICC's new regulation undermines the reliability of the tariff rate system and imposes potentially enormous financial liability on rail carriers at a time when Congress has made clear that the historically weak financial position of the rail industry should be strengthened, not impaired.

I. The Decision Below, by Holding That the ICC Has Authority to Reject Effective Tariff Increases, Conflicts with Prior Decisions of Other Courts of Appeals.

Until the decision below, it was recognized that a carrier's tariff could be rejected only *prior* to its taking effect. To set aside an already *effective* rate, the Commission was required to initiate a proceeding under Section 10704 of the Act, and make a finding of harm before

awarding damages. The courts had clearly established that the role of the tariff rejection power was limited to tariffs submitted but not yet effective.

Thus, in *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 676 F.2d 1374 (1982), the Eleventh Circuit struck down an ICC regulation that would have empowered an administrative board to reject a carrier's tariff for procedural defects—such as missymbolization—on complaints filed up to 60 days *after* the tariff had become effective. The ICC sought to sustain this regulation as a proper exercise of its Section 10762(e) tariff rejection power, but the court ruled—directly at odds with this case—that Section 10762(e) does not give the Commission authority "to reject or strike an *effective* tariff." See 676 F.2d at 1377 & n.10 (emphasis added). Referring to Section 10704 and related provisions, the court emphasized that "Congress set out in detail elsewhere in the Act the Commission's power" over effective tariffs. *Id.* at 1378.

In *Delta Air Lines, Inc.* v. *CAB*, 543 F.2d 247 (1976), the District of Columbia Circuit similarly construed the CAB's tariff rejection power under the Federal Aviation Act—whose rate provisions were modeled on the Interstate Commerce Act.[19] The CAB had purported to reserve authority to reject certain tariffs *after* they had become effective. The court of appeals, taking note of the established principle that tariff "rejection is a '"peremptory form of response to filed tariffs"' . . . used . . . for calling on the filing party to put its papers in proper form and order," ruled that "rejection is a

[19] See, *e.g.*, *Northeast Airlines, Inc.* v. *CAB*, 345 F.2d 662, 665-66 (5th Cir. 1965).

regulatory device properly used only *prior* to a tariff's effective date." *Id.* at 268 (emphasis in original; citation omitted). Just as the Interstate Commerce Act separately defines the ICC's authority over an effective rail carrier tariff, the *Delta Air Lines* court determined that the Federal Aviation Act allows the CAB to proceed with respect to an effective airline tariff "only" by way of "an investigation and hearing pursuant to section 1002"—the Federal Aviation Act counterpart to Section 10704. *Id.*

The limited role of the Commission's tariff rejection power is also supported by important policy considerations. If a tariff is rejected before taking effect, a carrier ordinarily may publish and file a corrected tariff without any serious adverse consequences for either itself or shippers. But once a tariff has taken effect, the situation changes materially: goods are shipped, revenues are collected, and business plans are formulated by carriers, shippers and customers based on the established and effective rates. Consequently, setting aside an effective rate may significantly affect the settled expectations and plans of many firms. Thus, it is with good reason that the Act defines the Commission's authority to set aside effective rates separately—in Section 10704—from its authority to reject summarily tariffs that have not yet taken effect.

The decision below ignores the difference in the Commission's authority over effective and proposed tariff rates,[20] and conflicts directly with the decisions in *South-*

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[20] The Court of Appeals' decision also ignores the limitations that exist on the Commission's authority over carrier rates. For example, the Act expressly provides that the Commission may not set aside a rate as unreasonably high when the carrier does not have "market dominance" with respect to the traffic to which the rate applies. See

ern Motor Carriers and *Delta Air Lines*.[21] While the court below attempted to distinguish both prior decisions, it was able to do so only by pointing to a difference without significance in the case of *Southern Motor Carriers*[22] and by completely ignoring the relevant portion of *Delta Air Lines*.[23] The conflict between the decision in this case and

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49 U.S.C. § 10709. Yet, if the decision below is sustained, the Commission will effectively be allowed to use its tariff rejection power to invalidate—for defects purely of form—effective rates that it is expressly precluded from invalidating as a substantive matter. This is an extraordinary result in view of Congress' efforts to restrict the Commission's authority to overturn carrier rate increases. See p. 5 n.13, above.

[21] Indeed, in adopting the new missymbolization regulation at issue here, the Commission expressly acknowledged that the regulation is merely "an expansion of principles . . . adopted" in the regulation added in *Ex Parte No. 367*, which the Eleventh Circuit struck down in *Southern Motor Carriers* subsequent to the ICC orders in this case. Pet. App. 14c.

[22] The Court of Appeals sought to distinguish *Southern Motor Carriers* on the ground that the regulation at issue there provided for only *informal* proceedings, whereas the present rule supposedly is enforceable on *formal* complaint and hearing. Pet. App. 11b n.6. As a practical matter, it appears highly unlikely that there will be many, if any, instances in which a hearing is warranted to apply the present regulation—a fact that the Commission itself acknowledged in its original notice of proposed rulemaking (Pet. App. 7e). But, in any event, nothing in Section 10762 makes the Commission's tariff rejection powers turn upon the formality or informality of the procedures employed; the Commission cannot exercise authority that it has not been given, whether it proposes to proceed formally or informally.

[23] The court below implies that *Delta Air Lines* turned entirely on a determination that the CAB lacked authority to reject tariffs on the particular grounds asserted in that case. Pet. App. 7b-9b. However, this reading completely ignores the *Delta Air Lines* court's explicit, independent determination (see 543 F.2d at 267-69) that the CAB's tariff rejection power—whatever the reason asserted for its exercise—does not extend to effective tariffs.

these prior decisions of other courts of appeals is real and potentially of far-reaching significance for the tariff rate system on which both carriers and shippers rely (see pp. 19-22, below). Such circumstances present the clearest possible case for plenary review by this Court on writ of certiorari. Cf. Rev. Rule 17.1(a), Sup. Ct. R.

II. The Decision Below, by Holding That Effective Tariff Rates May Be Treated as a Nullity for All Time, Conflicts with Prior Decisions of this Court.

When a tariff increase has been missymbolized, the Commission's new regulation directs that the increase shall be treated as a nullity and that the superseded rate shall be the applicable provision for all time. See p. 6, above. This extraordinary act of administrative legerdemain, which the decision below sustains (Pet. App. 11b-20b), directly conflicts with prior decisions of this Court—entirely apart from whether the Commission has authority to reject a tariff that has already taken effect. As the District of Columbia Circuit only recently recognized, this Court "long ago rejected the view" that an effective tariff on file with the Commission "should be disregarded or treated as non-existent merely because of some element of substantive unlawfulness in the rate . . . or some irregularity in the tariff filing formalities." *Genstar Chemical Ltd.* v. *ICC*, 665 F.2d 1304, 1308 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1750 (1982) (citations omitted).

In *Davis* v. *Portland Seed Co.*, 264 U.S. 403 (1924), a shipper argued that the tariff charged him—which was admittedly unlawful because it violated the Act's long-haul short-haul provision[24]—should be treated as "non-

[24] Section 4 of the Act, now 49 U.S.C. § 10726.

existent" and that he should be allowed to recover on the basis of the lower rate charged favored shippers. This Court explicitly rejected the suggestion that a filed and effective tariff could be treated as "non-existent" (264 U.S. at 416, 422), holding that the shipper was entitled to recover only any actual damages he had suffered (*e.g.*, due to loss of business to a favored shipper or due to payment in excess of a reasonable maximum rate).

Similarly, in *Berwind-White Co.* v. *Chicago & E.R.R.*, 235 U.S. 371 (1914), this Court refused to allow a shipper to avoid liability to a carrier for demurrage charges on the premise that the tariff prescribing such charges was non-existent, even though the carrier allegedly had failed to comply strictly with the applicable tariff filing formalities. The Court emphasized that the tariff documents had been received and placed on file by the Commission (see 235 U.S. at 375), and thus there was an effective tariff that could not simply be ignored.[25]

If an effective tariff could automatically be treated as a nullity with retroactive effect for some procedural—or even substantive—defect, shippers might be able to obtain enormous windfall recoveries and carriers might be severly penalized, entirely without regard to whether any actual injury had occurred. This is precisely the effect that the ICC's new regulation would have by enabling shippers to recover the full amount of any missymbolized rate increase (see pp. 6-7, above). Such liability bears no

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[25] See also *Texas & P. Ry.* v. *Cisco Oil Mill*, 204 U.S. 449 (1907), where the Court held that a tariff could not be treated as a nullity because of the carrier's alleged failure to comply with the requirement (then contained in the Act) that published tariffs shall be posted for public inspection.

necessary relationship to harm suffered by shippers, since a missymbolized increase may be entirely reasonable and lawful as a substantive matter. Nonetheless, the Commission's new regulation would treat all missymbolized increases—however reasonable and nondiscriminatory they may be—as nullities and would not merely allow shippers to recover any actual damages but impose on carriers a private penalty in the full amount of the missymbolized increase.

It was the prospect of just such a private penalty that this Court found unsupportable under the Act in *Davis* v. *Portland Seed Co.*, *supra*. There, the Court emphasized that nowhere in the Act did Congress evidence an intent " 'that persons not injured might, nevertheless, recover what though called damages would really be a penalty, in addition to the penalty payable to the Government.' "[26] 264 U.S. at 418 (citations omitted). Accordingly, the Court held that the shipper in *Davis* was not entitled to a refund merely upon establishing the illegality of a rate, "without other proof of actual damage."[27] 264 U.S. at 415.

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[26] The Act expressly provides civil penalties for violation of the Commission's tariff publication regulations as well as for numerous other carrier violations. 49 U.S.C. § 11901(b). See generally 49 U.S.C. §§ 11901-02.

[27] Section 11705(b)(1) of the Act, 49 U.S.C. § 11705(b)(1), does authorize a shipper to recover "amounts charged that exceed the applicable rate for transportation or service" contained in a filed and effective tariff. However, as the District of Columbia Circuit only recently held, such overcharge liability does not authorize a court or the ICC to disregard a filed and effective tariff—as the Commission has sought to do in its present regulation. See *Genstar Chemical Ltd.* v. *ICC*, *supra*, 665 F.2d at 1308-10. Rather, Section 11705(b)(1) authorizes recovery of charges that "*exceed*" the filed and effective

Davis is only one of a series of decisions in which this Court has made clear that the Act provides no authority for what are in substance private penalty awards to shippers, calculated without regard to whether they have suffered any actual harm. Indeed, one of this Court's earliest decisions construing the Act established that "before any [private] party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury." *Parsons* v. *Chicago & N.W. Ry.*, 167 U.S. 447, 460 (1897).[2]

The decision below cannot be reconciled with this Court's prior decisions in *Davis* and *Berwind-White* or the precedent underlying them. Indeed, the Court of Appeals admitted that the Commission's new regulation seeks to invalidate "retroactive[ly]" missymbolized tariff rate increases and authorize shippers to obtain refunds without "any injury-in-fact prerequisite." Pet. App. 12b, 22b. The court's decision implies, however, that the ICC's effort to exercise such authority involves, at most, a departure from only a series of previous Commission decisions. Pet. App. 12b-15b. It is true that, with the present regulation, the Commission has turned its back on a long line of prior ICC precedent in which it has held that a filed and effective tariff may not be treated as non-existent and shippers awarded refunds without re-

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rate. See, *e.g.*, *United States* v. *Kansas City Ry.*, 116 F. Supp. 484, 488 (W.D. Mo. 1953), *vacated on other grounds*, 217 F.2d 763 (8th Cir. 1955).

[2] Accord, *e.g.*, *ICC* v. *United States*, 289 U.S. 385, 389 (1933); *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156, 164-65 (1922); *Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 204, 206 (1913).

gard to actual harm.[29] But, as the Commission itself acknowledged, the new regulation represents "a departure from numerous . . . court decisions" as well. See p. 7, above.[30]

The conflict that exists between the decision below and this Court's decisions constitutes a further compelling reason for plenary review by this Court on certiorari. Cf. Rule 17.1(c), Sup. Ct. R.

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[29] See, *e.g.*, *Shobe, Inc.* v. *Bowman Transport, Inc.*, 350 I.C.C. 664, 669-71 (1975); *Phillips Petroleum Co.* v. *Akron, C. & Y.R.R.*, *supra*, 308 I.C.C. at 260; *Bacon Bros.* v. *Alabama G.S.R.R.*, 263 I.C.C. 587, 590 (1945); *Chase & Co.* v. *Atlantic C.L.R.R.*, 220 I.C.C. 398, 400 (1937); *Dewey Portland Cement Co.* v. *Atchison, T. & S.F. Ry.*, 185 I.C.C. 233 (1932); *Greene Cananea Copper Co.* v. *Chicago, R.I. & P. Ry.*, 88 I.C.C. 225 (1924).

[30] The Court of Appeals did not even discuss the applicable prior decisions of this Court in holding that the Commission may treat filed and effective tariffs as nullities for all time; rather, the court cited only two lower court decisions in support of its conclusion. The principal decision, *Chicago, M., St. P. & P.R.R.* v. *Alouette Peat Products, Ltd.*, 253 F.2d 449 (9th Cir. 1957), dealt almost entirely with the issue whether a carrier has any liability at all for failing to comply with tariff implementation requirements imposed by the Act itself and gave only brief consideration to the appropriate remedy. *Id.* at 455-56. Another court of appeals has only recently refused to follow *Alouette Peat* in light of, among other things, this Court's decisions in *Davis* and *Berwind-White*. See *Genstar Chemical Ltd.* v. *ICC*, *supra*, 665 F.2d at 1309. The second decision cited by the court below, *Axinn & Sons Lumber Co.* v. *Long Island R.R.*, 466 F. Supp. 993, 996-97 (E.D.N.Y. 1978), merely treated *Alouette Peat* as controlling with regard to shippers' right to refunds in the context of a substantively invalid tariff filing.

III. The Questions Raised by the Decision Below Are of Exceptional Importance.

The questions presented by this case directly affect the integrity of the tariff rate system upon which carriers and shippers throughout the nation rely. The Act, by prescribing a detailed system of rate publication and strict adherence to effective published rates, seeks to foster certainty and stability in transportation markets. See, *e.g.*, *Boston & M.R.R.* v. *Hooker*, 233 U.S. 97, 112 (1914); *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, *supra*, 676 F.2d at 1378. The decision below, however, injects a whole new element of uncertainty into the tariff rate system for a purely technical defect, and with extremely serious potential financial consequences.

Each year thousands of tariff changes are published and filed by carriers. See *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 457 (1979). Once a rate increase reflected in such tariff filings becomes effective, carriers proceed to apply and collect the increase from shippers. Under the Commission's new regulation, however, it may be determined years after a tariff change has taken effect that a rate increase is not in fact valid and collectible solely because of an erroneous symbol and entirely without regard to the reasonableness of the increase as a substantive matter. Carriers and shippers alike will no longer be able to rely as they have in the past on effective published rates, and the resulting effect on transportation markets will inevitably be "unsettling." Cf. *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, *supra*, 676 F.2d at 1378-79.

Moreover, the financial impact on the nation's carriers could prove to be enormous. A single rate increase can involve tens of thousands of dollars in revenues daily; and

in the past the railroads have been presented with claims totaling millions of dollars as a result of a misplaced comma in the publication of general rate increases.[31] The present regulation does not touch merely a single rate increase or a single set of rates; rather, it would render carriers strictly liable for a three-year period for the full amount of each future tariff rate increase that does not bear the proper Commission prescribed symbol upon publication.

This is an extraordinary liability to impose on carriers for a clerical or typographical error—missymbolization—that the Commission's own tariff integrity board has previously described as a mere "technicality."[32] If shippers waited a full three years before objecting to a missymbolized rate increase,[33] the result could easily be the loss by carriers of tens of millions of dollars in badly needed revenues. Neither the Interstate Commerce Act nor Commission regulation provides any procedure by

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[31] See *Inclusion of Interstate Application of Authorized General Rate Increases*, 359 I.C.C. 295, 307 n.7 (1979), where the railroads received refund claims totaling $4.5 million and estimated potential liability at $25 million.

[32] See *Sea-Land Serv., Inc.* v. *Trans-Continental Freight Bureau*, served May 19, 1980, at 1 (I.C.C. T.I.B. No. 80-28).

[33] In fact, a particularly unfortunate consequence of the Commission's new regulation could be to encourage shippers not to provide prompt notice of symbolization errors of which they are aware but rather to do so only when the three-year limitations period for their refund claims (see p. 8, above) has almost run. Under the Commission's new regulation, each day that passes without the limitations period expiring would be another day for which the shipper would ultimately have to pay freight charges based only on the lower superseded rate and would never be subject to the increased rate, however substantively valid it might be.

which carriers may retroactively implement a rate increase that is perfectly lawful as a substantive matter, and thus retain revenues collected under an effective but missymbolized tariff increase invalidated pursuant to the Commission's new regulation.

The Commission's imposition of such potentially damaging strict liability is especially troubling in light of Congress' repeated efforts in recent years to compel the Commission to improve the rail industry's historically weak financial position. With increasing specificity, Congress has directed the Commission to consider the revenue needs of rail carriers and enable carriers to earn sufficient revenues to cover their costs and to provide them with an adequate return to attract new capital.[34] The Commission's present regulation, however, works directly against this important, congressionally declared policy of revenue adequacy for rail carriers: whether or not a rate increase is entirely justified in terms of carriers' revenue requirements, the regulation expressly prescribes that the increase is "invalid and not collectible"—and that the lower "superseded" rate shall in fact apply—whenever a tariff rate increase is missymbolized.[35]

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[34] See Act of Feb. 5, 1976, Pub. L. No. 94-210, § 205, 90 Stat. 41, *now codified in* 49 U.S.C. § 10704(a)(2); Act of Oct. 14, 1980, Pub. L. No. 96-448, tit. II, § 201(a), 94 Stat. 1898, *codified in* 49 U.S.C. § 10701a(3).

[35] This extreme result is not required to protect any legitimate interest of shippers; the Act expressly affords a remedy for any actual substantive harm suffered by a private party as a result of a carrier initiated tariff rate increase. See 49 U.S.C. § 11705(b)(2). Nor can the regulation reasonably be justified as necessary to coerce carriers to exercise due care in preparing and publishing tariff sheets

In short, the decision below, sustaining this new ICC regulation, presents the very sorts of questions "of obvious importance" that this Court has traditionally considered appropriate for exercise of its certiorari jurisdiction. Cf. *FPC* v. *Texaco Inc.*, 417 U.S. 380, 383 (1974). They are important in terms of the structure of the Act because they bear upon the basic division between the more summary procedures applicable to tariffs prior to their taking effect and the different plan specifically articulated for effective tariff rates; and they are practically important because of the enormous potential liability that the Commission's new approach imposes upon the hard-pressed rail industry. When these factors are considered together with the direct conflicts that exist with prior decisions of both this Court and other courts of appeals, there should be no doubt that this case warrants plenary review by the Court.

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setting forth rate increases; the Act gives the Commission ample authority to impose specific civil penalties for any violation of its tariff publication regulations. See 49 U.S.C. § 11901(b).

CONCLUSION

For the reasons stated, certiorari should be granted and the case set for plenary review by this Court.

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No. 82-707

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

The petitioner railroads submit this supplemental brief to bring to the Court's attention a recent decision of the Eleventh Circuit that eliminates any question as to the existence of a clear and direct conflict between the decision below and the rulings of other courts of appeals. As discussed in the railroads' petition, the Court of Appeals in this case sought to distinguish the Eleventh Circuit's previous decision in *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 676 F.2d 1374 (1982)—holding that the ICC does not have authority to reject *effective* tariffs—on the ground that the regulation at issue there provided only for *informal* proceedings, whereas the regulation involved in this case will supposedly be enforced on *formal* complaint and hearing.

Pet. App. 11b n.6.[1] While this distinction is in fact without substantive significance (see Pet. at 13 n.22), the Eleventh Circuit has recently rendered a decision in *American Trucking Ass'n, Inc.* v. *United States*, 688 F.2d 1337 (1982), squarely holding that the ICC is without authority to reject an effective tariff whatever procedures are used and eliminating the purported distinction upon which the court below relied.

In *American Trucking Ass'n, Inc.*, the Eleventh Circuit ruled that the ICC may not enforce rate bureau provisions of the Interstate Commerce Act by rejecting tariffs "after the tariffs become effective." 688 F.2d at 1354. The court observed that "the plain meaning of rejection is to refuse to receive"; that it has previously been held "that 'rejection is a regulatory device properly used only *prior* to a tariff's effective date' "; and that the Act provides the Commission with a set of "enforcement powers," distinct from its rejection authority, to deal with effective tariffs that are found to be unlawful. *Id.* (citations omitted). The court also observed that rejection of effective tariffs "undermines the uniformity and reliability interests that the system of tariff filing was meant to foster." *Id.* at 1355. In short, "[r]eview of the statute, the major decisions, and policy" led the Eleventh Circuit to conclude "that rejection or suspension after a tariff becomes effective is in conflict with the statute and thus may not be done either as an interpretation of the statutory powers or by independent rulemaking." *Id.*

The ICC sought to avoid this result and to put aside the court's prior ruling in *Southern Motor Carriers* by argu-

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[1] Citations to "Pet. App. ____" refer to the appendix to the railroads' petition.

ing that the Commission decision at issue in *American Trucking Ass'n* envisioned "formal complaint procedures before the Commission prior to rejection of any tariff" (688 F.2d at 1354)—the distinction asserted by the court below in this case. The Eleventh Circuit recognized, however, that "providing more formal procedures does not cure the essential defect in rejecting or suspending effective tariffs, namely, that the statute and caselaw limit these powers to use against only proposed tariffs." *Id.* at 1356. Thus, the court held that the Commission may not exercise its rejection power over effective tariffs, whether it chooses to proceed by formal or informal procedures. See *id.* at 1354.[2]

In short, the Eleventh Circuit's recent decision in *American Trucking Ass'n* confirms that the decision in this case ignores the difference in the Commission's statutory authority over effective and proposed tariff rates and is in direct conflict with the holdings of other courts of appeals. Such conflict—which has considerable practical significance for the tariff rate system on which carriers and shippers alike rely (see Pet. at 19-21)—warrants plenary review of this case on certiorari. Cf. Rule 17.1(a), Sup. Ct. R.

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[2] The Eleventh Circuit in *American Trucking Ass'n* also rejected the Commission's reliance upon *Chicago, M., St.P. & P.R.R.* v. *Alouette Peat Products, Ltd.*, 253 F.2d 449 (9th Cir. 1957)—the decision upon which the court below principally relied (Pet. App. 13b-17b). Upon analysis, the Eleventh Circuit found *Alouette Peat* to be "internally inconsistent, contrary to the statute and consistent Commission decisions, and in conflict with Supreme Court precedent." 688 F.2d at 1356 (footnotes omitted). The Eleventh Circuit thus became the second circuit court in recent times to decline to follow *Alouette Peat*. See also *Genstar Chemical Ltd.* v. *ICC*, 665 F.2d 1304, 1309 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1750 (1982).

CONCLUSION

For the reasons stated above and in the railroads' petition, certiorari should be granted and the case set for plenary review by this Court.

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APPENDIX

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APPENDIX A

1. The following railroads are petitioners in this case:

Aberdeen and Rockfish Railroad Company
Ahnapee and Western Railway Company, The, A division of McCloud River Railroad Company
Akron & Barberton Belt Railroad Company, The
Akron, Canton & Youngstown Railroad Company, The
Alabama Great Southern Railroad Company, The (See Southern Railway System)
Alaska Railroad, The
Alexander Railroad Company
Algoma Central Railway
Aliquippa and Southern Railroad Company
Almanor Railroad Company
Alton & Southern Railway Company
Amador Central Railroad Company
Angelina & Neches River Railroad Company
Ann Arbor Railroad Company, The, John M. Chase, Jr., Trustee
Apache Railway Company, The
Apalachicola Northern Railroad Company
Arcade and Attica Railroad Corporation
Arcata and Mad River Rail Road Company, The
Arkansas & Louisiana Missouri Railway Company
Arkansas Western Railway Company, The
Aroostook Valley Railroad Company
Ashley, Drew & Northern Railway Company, The
Atchison, Topeka and Santa Fe Railway Company, The
Atlanta & Saint Andrews Bay Railway Company
Atlanta and West Point Rail Road Company
Atlantic and East Carolina Railway Company (See Southern Railway System)
Atlantic and Western Railway Company
Aurora, Elgin and Fox River Electric Company
Baltimore and Annapolis Railroad Company, The
Baltimore and Ohio Chicago Terminal Railroad Company, The
Baltimore and Ohio Railroad Company, The
Bangor and Aroostook Railroad Company

Bath and Hammondsport Railroad Company
Bauxite & Northern Railway Company
Beaufort and Morehead Railroad Company (A. T. Leary, Lessee)
Belfast and Moosehead Lake Railroad Company
Bellefonte Central Railroad Company
Belt Railway Company of Chicago, The
Belton Railroad Company
Bessemer and Lake Erie Railroad Company
Bevier & Southern Railroad Company
Birmingham Southern Railroad Company
Black River & Western Corporation
Boston and Maine Corporation, Robert W. Meserve and Benjamin H. Lacy, Trustees
British Columbia Hydro and Power Authority
Brooklyn Eastern District Terminal
Burlington Northern, Inc.
Burlington Northern (Manitoba) Limited
Butte, Anaconda & Pacific Railway Company
Cadiz Railroad Company
Cadillac & Lake City Railway Company C. F. Lenten and W. H. Nicholls, Jr., Trustees
California Western Railroad
Camas Prairie Railroad Company
Cambria and Indiana Railroad Company
Camino, Placerville & Lake Tahoe Railroad Company
Camp Lejeune Railroad Company (See Southern Railway System)
Canada and Gulf Terminal Railway Company, The
Canadian National Railways (Lines Port Arthur, Armstrong, Ont., and West thereof)
Canadian National Railways (Lines West Fort William, Ont., and East thereof)
Carolina and Northwestern Railway Company (See Southern Railway System)
CP Rail (Canadian Pacific Limited) (Lines Thunder Bay, Ont., and East thereof)

CP Rail (Canadian Pacific Limited) (Lines Thunder Bay, Ont., and West thereof)
Canton Railroad Company
Cape Fear Railways, Incorporated
Carbon County Railway Company
Carolina, Clinchfield and Ohio Railway; Carolina, Clinchfield and Ohio Railway of South Carolina. Lessees: Seaboard Coast Line Railroad Company; Louisville and Nashville Railroad Company
Carrollton Railroad, The
Cedar Rapids and Iowa City Railway Company
Central California Traction Company
Central New York Railroad Corporation
Central of Georgia Railroad Company (See Southern Railway System)
Central Vermont Railway, Inc.
Charles City Western Railway Company
Chattahoochee Industrial Railroad
Chattahoochee Valley Railway Company
Chesapeake and Ohio Railway Company, The
Chesapeake Western Railway
Chesnut Ridge Railway Company
Chicago & Illinois Midland Railway Company
Chicago & Illinois Western Railroad
Chicago and North Western Transportation Company
Chicago and Western Indiana Railroad Company
Chicago Heights Terminal Transfer Railroad Company
Chicago, Madison and Northern Railway Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
Chicago, South Shore and South Bend Railroad
Chicago, West Pullman & Southern Railroad Company
Cincinnati, New Orleans and Texas Pacific Railway Company, The (See Southern Railway System)
City of Prineville Railway
Claremont and Concord Railway Company, Inc.
Clarendon and Pittsford Railroad Company, The
Cliffside Railroad Company

Colonel's Island Railroad Company
Colorado and Southern Railway Company, The
Colorado and Wyoming Railway Company, The
Columbia & Cowlitz Railway Company
Columbia, Newberry and Laurens Railroad Company
Columbus and Greenville Railway Company
Condon, Kinzua & Southern Railroad Company
Conemaugh & Black Lick Railroad Company
Consolidated Rail Corporation
Cooperstown and Charlotte Valley Railroad Corporation
Corinth and Counce Railroad Company, The
Curtis, Milburn and Eastern Railroad Company
Cuyahoga Valley Railroad Company, The
Dansville and Mount Morris Railroad Company, The
Dardenelle & Russellville Railroad Company
Davenport, Rock Island and North Western Railway Company
Delaware and Hudson Railway Company, The
Delta Valley & Southern Railway Company
Denver and Rio Grande Western Railroad Company, The
DeQueen and Eastern Railroad Company
Des Moines and Central Iowa Railway Company
Detroit and Mackinac Railway Company
Detroit and Toledo Shore Line Railroad Company, The
Detroit, Toledo and Ironton Railroad Company
Dominion Atlantic Railway Company, The
Doniphan, Kensett & Searcy Railway
Duluth & Northeastern Railroad Company
Duluth, Missabe and Iron Range Railway Company
Duluth, Winnipeg and Pacific Railway Company
Durham and Southern Railway Company
East Camden & Highland Railroad Company
East Cooper and Berkeley Railroad Company
East Jersey Railroad and Terminal Company
East Tennessee and Western North Carolina Railroad Company
East Washington Railway Company
El Dorado and Wesson Railway Company

Elgin, Joliet and Eastern Railway Company
Erie Western Railway Company
Escanaba and Lake Superior Railroad Company
Esquimalt and Nanaimo Railway Company, The
Essex Terminal Railway Company, The
Fairport, Painesville and Eastern Railway Company, The
Ferdinand Railroad Company
Ferrocarril del Pacifico, S.A. de C.V. (Pacific Railroad)
Florida East Coast Railway Company
Fonda, Johnstown and Gloversville Railroad Company
Fordyce and Princeton R.R. Co.
Fore River Railroad Corporation
Fort Myers Southern Railroad Company
Fort Smith and Van Buren Railway Company
Fort Worth and Denver Railway Company
Frankfort & Cincinnati Railroad Company
Gainesville Midland Railroad Company
Galveston, Houston and Henderson Railroad Company
Garden City Western Railway Company, The
Genessee and Wyoming Railroad Company
Georgetown Railroad Company
Georgia Northern Railway Company (See Southern Railway System)
Georgia Rail Road & Banking Company—Operated as the Georgia Railroad by Lessees: Seaboard Coast Line Railroad Company, Louisville and Nashville Railroad Company
Georgia Southern and Florida Railway Company (See Southern Railway System)
Goodwin Railroad, Inc.
Grafton and Upton Railroad Company
Grand River Railway Company, The
Grand Trunk Railway System (Lines in the United States, east of the west bank of the Detroit and St. Clair Rivers), comprising the following carrier: Canadian National Railway Company
Grand Trunk Western Railroad Company
Graysonia, Nashville & Ashdown Railroad Company
Great Southwest Railroad, Inc.

Great Western Railway Company, The
Green Bay and Western Railroad Company
Green Mountain Railroad Corporation
Greenville and Northern Railway Company
Greenwich & Johnsonville Railway Company
Hampton & Branchville Railroad Company
Hartford and Slocomb Railroad Company
Hartwell Railway Company
High Point, Thomasville & Denton Railroad Company
Hoboken Shore Railroad
Hollis & Eastern Railroad Company
Holton Inter-Urban Railway Company (See Southern Pacific Lines)
Hoosac Tunnel and Wilmington Railroad Company
Houston Belt & Terminal Railway Company
Hutchinson and Northern Railway Company, The
Illinois Central Gulf Railroad Company
Illinois Terminal Railroad Company
Indiana and Ohio Railroad, Inc.
Indiana Harbor Belt Railroad Company
International Bridge and Terminal Company, Inc.
Interstate Railroad Company (See Southern Railway System)
Iowa Terminal Railroad Co.
Kankakee, Beaverville and Southern Railroad Company, The
Kansas City Southern Railway Company, The
Kansas City Terminal Railway Company
Kentucky & Indiana Terminal Railroad Company
Kentucky and Tennessee Railway
Klamath Northern Railway Company
Lacawaxen and Stourbridge Railway Corporation
Lake Erie and Eastern Railroad Company, The
Lake Erie and Northern Railway Company, The
Lake Erie, Franklin & Clarion Railroad Company
Lake Superior & Ishpeming Railroad Company
Lake Terminal Railroad Company, The
Lancaster and Chester Railway Company
Laona & Northern Railway Company
La Salle and Bureau County Railroad Company, The

Laurinburg and Southern Railroad Company
Live Oak, Perry & South Georgia Railroad Company (See Southern Railway System)
Livonia, Avon & Lakeville Railroad Corporation
Long Island Rail Road Company, The
Longview, Portland & Northern Railway Company
Lorain & West Virginia Railway Company, The
Los Angeles Junction Railway Company
Louisiana & Arkansas Railway Company
Louisiana and North West Railroad Company, The
Louisiana Midland Railway Company
Louisiana Southern Railway Company (See Southern Railway System)
Louisville and Nashville Railroad Company
Louisville and Wadley Railway Company
Louisville, New Albany & Corydon Railroad Company
Lowville and Beaver River Railroad Company, The
Magma Arizona Railroad Company
Maine Central Railroad Company
Manufacturers Railway Company
Marianne & Blountstown Railroad Company, The
Marinette, Tomahawk & Western Railroad Company
Marquette & Huron Mountain Railroad Company, Inc.
Maryland & Delaware Railroad Company, The
McCloud River Railroad Company
McKeesport Connecting Railroad Company
Meridian & Bigbee Railroad
Michigan Northern Railway Company, Incorporated
Middletown & Hummelstown Railroad Company
Middletown and New Jersey Railway Company, Inc.
Milstead Railroad Company
Minneapolis Industrial Railway Company
Minneapolis, Northfield and Southern Railway
Minnesota, Dakota & Western Railway Company
Mississippi & Skuna Valley Railroad Company
Mississippi Export Railroad Company
Mississippian Railway
Missouri-Illinois Railroad Company

Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
Mobile & Gulf Railroad Company, The
Modesto and Empire Traction Company
Monongahela Connecting Railroad Company, The
Monongahela Railway Company, The
Montour Railroad Company
Montpelier and Barre Railroad Company
Morristown & Erie Railroad Company
Moscow, Camden & San Augustine Railroad
Moshassuck Valley Railroad Company
Mount Hood Railway Company
Municipal Docks Railway of the Jacksonville Port Authority
Municipality of East Troy, Wisconsin
Napierville Junction Railway Company
Natchez, Urania and Ruston Railway Company, The
Nevada Northern Railway Company
New Brunswick Coal and Railway
Newburgh and South Shore Railway Company, The
New Hope & Ivyland Railroad Company
New Jersey, Indiana & Illinois Railroad Company
New Orleans Terminal Company (See Southern Railway System)
New York Dock Railway
New York, Susquehanna and Western Railroad Company
Nezperce Railroad Company
Norfolk and Western Railway Company
Norfolk, Franklin and Danville Railway Company
North Louisiana & Gulf Railroad Company
Northwestern Pacific Railroad Company (See Southern Pacific Lines)
Octoraro Railway, Inc.
Oklahoma, Kansas and Texas Railroad Company
Ontario Central Railroad Corp.
Ontario Midland Railroad Corp.
Ontario Northland Railway, The
Oregon & Northwestern Railroad Co.
Oregon, California & Eastern Railway Company

Oregon Electric Railway Company
Oregon Pacific and Eastern Railway Company
Oregon Trunk Railway
Paducah & Illinois Railroad Company
Patapsco & Back Rivers Railroad Company
Pearl River Valley Railroad Company
Pecos Valley Southern Railway Company, The
Pend Oreille Valley Railroad, Inc.
Peoria and Pekin Union Railway Company
Petaluma and Santa Rosa Railroad Company (See Southern Pacific Lines)
Philadelphia, Bethlehem and New England Railroad Company
Pickens Railroad Company
Pittsburgh & Shawmut Railroad Company, The
Pittsburgh and Lake Erie Railroad Company, The
Pittsburgh, Chartiers & Youghiogheny Railroad Company
Point Comfort & Northern Railway Company
Port Bienville Railroad
Port Huron and Detroit Railroad Company
Portland Terminal Company
Portland Traction Company (Portland Railroad and Terminal Division)
Port Terminal Railroad of South Carolina
Port Utilities Commission of Charleston, S.C., The
Prairie Trunk Railway
Prescott and Northwestern Railroad Company, The
Providence and Worcester Company
Quanah, Acme & Pacific Railway Company
Quebec Central Railway Company
Quincy Railroad Company
Rahway Valley Company (Rahway Valley Company, Lessee)
Richmond, Fredericksburg and Potomac Railroad Company
Roberval and Saguenay Railway Company, The
Rockdale, Sandow & Southern Railroad Company
Rockton & Rion Railway
Roscoe, Snyder and Pacific Railway Company
St. Johns River Terminal Company (See Southern Railway System)

St. Louis-San Francisco Railway Company
St. Louis Southwestern Railway Company
St. Marys Railroad Company
St. Maries River Railroad Company
Sabine River & Northern Railroad Company
Sacramento Northern Railway
Salt Lake, Garfield and Western Railway Company
San Diego and Arizona Eastern Transportation Company
San Springs Railway Company
Sandersville Railroad Company
San Luis Central Railroad Company, The
San Manuel Arizona Railroad Company
Santa Maria Valley Railroad Company
Seaboard Coast Line Railroad Company
Seattle & North Coast Railroad Company
Sierra Railroad Company
Skaneateles Short Line Railroad Corporation
Soo Line Railroad Company
South Brooklyn Railway Company
South Buffalo Railway Company
South Central Tennessee Railroad, The
Southern Indiana Railway, Inc.
Southern Pacific Transportation Company (See Southern Pacific Lines)
Southern Pacific Lines: Holton Inter-Urban Railway Company, Northwestern Pacific Railroad Company, Petaluma and Santa Rosa Railroad Company, Southern Pacific Transportation Company, Visalia Electric Railroad Company
Southern Railway Company (See Southern Railway System)
Southern Railway System: The Alabama Great Southern Railroad Company, Atlantic and East Carolina Railway Company, Carolina and Northwestern Railway Company, Camp Lejeune Railroad Company, Central of Georgia Railroad Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, Georgia Northern Railway Company, Georgia Southern and Florida Railway Company, Interstate Railroad Company, Live Oak, Perry & South Georgia Rail-

way Company, Louisiana Southern Railway Company, New Orleans Terminal Company, St. Johns River Terminal Company, Southern Railway Company, State University Railroad Company, Tennessee, Alabama & Georgia Railway Company

Southern San Louis Valley Railroad Company
Spokane International Railroad Company
Springfield Terminal Railway Company (Vermont)
State University Railroad Company (See Southern Railway System)
Staten Island Railroad Corporation, The
Steelton & Highspire Railroad Company
Stevens Line Company
Stockton Terminal and Eastern Railroad
Sumter & Choctaw Railway Company
Sunset Railway Company
Tampa Southern Railroad Company
Tennessee, Alabama & Georgia Railway Company (See Southern Railway System)
Tennessee Railroad Company (Samuel Spencer and Tom J. Gentry, Receivers)
Terminal Railroad Association of St. Louis
Texas & Northern Railway Company
Texas Central Railroad Company
Texas Mexican Railway Company, The
Texas, Oklahoma & Eastern Railroad Company
Texas South-Eastern Railroad Company
Tidewater Southern Railway Company
Toledo, Peoria & Western Railroad Company
Toledo Terminal Railroad Company, The
Tooele Valley Railway Company
Toronto, Hamilton and Buffalo Railway Company, The
Transkentucky Transportation Railroad Co., Inc.
Trona Railway Company
Tucson, Cornelia and Gila Bend Railroad Company
Tulsa-Sapulpa Union Railway Company
Twin Branch Railroad Company
Union Pacific Railroad Company

Union Railroad Company
Unity Railways Company
Utah Railway Company
Valdosta Southern Railroad
Valley and Siletz Railroad Company
Ventura County Railway Company
Vermont Railway, Inc.
Virginia and Maryland Railroad Company, The
Virginia Blue Ridge Railway
Virginia Central Railway
Visalia Electric Railroad Company (See Southern Pacific Lines)
Walla Walla Valley Railway Company
Ware Shoals Railroad Company
Warren & Saline River Railroad Company
Warrenton Rail Road Company
Warwick Railway Company
Washington, Idaho & Montana Railway Company
Waterloo Railroad Company
Weatherford, Mineral Wells and Northwestern Railway Company, The
Western Maryland Railway Company
Western Pacific Railroad Company, The
Western Rail Road Company
Western Railway of Alabama, The
West Virginia Northern Railroad Company
White Sulphur Springs & Yellowstone Park Railway Company
Winchester and Western Railroad Company
Winfield Railroad Company, The
Winifrede Railroad Company
Winston-Salem Southbound Railway Company
Yakima Valley Transportation Company
Youngstown & Southern Railway Company
Yreka Western Railroad Company
United States of America
Interstate Commerce Commission
National Motor Freight Traffic Association, Inc.

2. The following is a list of parent companies, subsidiaries and affiliates, as available to counsel, for the principal railroads of the United States that are petitioners in this case.[1]

Companies Related To The Atchison, Topeka And Santa Fe Railway Company

Advertising Direction, Inc.
Alameda Belt Line
B&C General Agency, Inc.
Clinton and Oklahoma Western Railroad Company, The
Dodge City and Cimarron Valley Railway Company, The
Fresno Interurban Railway Company
Gallo Wash Coal Company
Garden City, Gulf and Northern Railroad Company, The
Global Security Company, Inc.
Gulf and Inter-State Railway Company of Texas
Gulf Central Pipeline Company
Gulf Central Storage and Terminal Company
Gulf Central Storage and Terminal Company of Nebraska
Haystack Mountain Development Company
Hospah Coal Company
Kansas Southwestern Railway Company, The
Kirby Forest Industries, Inc.
Los Alamos Constructors, Inc.
Los Angeles Junction Railway Company
McKee Development Services, Inc.
Oakland Terminal Railway, The
Oklahoma City Junction Railway Company
Pintada Coal Company
Rio Grande, El Paso and Santa Fe Railroad Company
Robert E. McKee, Inc.

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[1] Because of uncertainty about the definition of these terms and the complexity of corporate relationships, the following list includes a limited number of companies that may, depending on the definition employed, not constitute parent companies, subsidiaries or affiliates.

St. Joseph Terminal Railroad Company
San Diego Pipeline Company
Santa Fe Energy Company
Santa Fe Energy Company of Seychelles, Inc.
Santa Fe Energy Products Company
Santa Fe Forwarding Company
Santa Fe Industrial Realty Company
Santa Fe Industries, Inc.
Santa Fe Land Improvement Company
Santa Fe Mining, Inc.
Santa Fe Natural Resources, Inc.
Santa Fe Oil Company
Santa Fe Pacific Railroad Company
Santa Fe Pipeline Company
Santa Fe Pipelines, Inc. (Del.)
Santa Fe Rail Equipment Company
Santa Fe Terminal Services, Inc.
Santa Fe Towers Land Company
Santa Fe Trail Transportation Company, The
Santa Fe Transportation Company
Security Guard Service, Inc.
SF Coal Corporation
SFP Minerals Corporation
Southwest Pipe Line Company
Standard Office Building Corporation
Star Lake Railroad Company
Sun Country Construction Company
Sunset Railway Company
Toledo, Peoria & Western Railroad Company
Walker-Kurth Lumber Company
Zia Company, The

Companies Related To The Baltimore And Ohio Railroad Company, The Chesapeake And Ohio Railway Company, And Western Maryland Railway Company

Adrian Realty Co.
Baltimore and Ohio Chicago Terminal Railroad Co., The
Baltimore and Ohio Connecting Railroad Co., The

Baltimore and Ohio Warehouse Co., The
Baltimore and Philadelphia Railroad Co., The
B&O Transportation Co., The
Baltimore Belt Railroad Co., The
Buffalo, Rochester and Pittsburgh Railway Co.
Centralia and Webster Springs Railroad Co.
Cheat Haven and Bruceton Railroad Co.
Cheat Haven Railroad Co., The
Chesapeake and Curtis Bay Railroad Co., The
Chessie Corp., The
Chessie Motor Express, Inc.
Chessie Realty, Inc.
Chicago South Shore and South Bend Railroad
Cincinnati, Indianapolis & Western Railroad Co., The
Cleveland Terminal & Valley Railroad Co., The
Covington and Cincinnati Elevated Railroad and Transfer and Bridge Co., The
CSX Corporation
Curtis Bay Railroad Co.
Dayton and Michigan Railroad Co.
Dayton and Union Railway Co., The
Fairfax Realty Co.
Fairmont, Morgantown and Pittsburgh Railroad Co.
Fruit Growers Express Co.
Kanawha-Ohio Corp.
Lake Erie and Detroit River Railway Co., The
Lancaster, Cecil and Southern Railroad Co., The
Louisville & Nashville Railroad Company
Maryland and West Virginia Co.
Maryland Construction Co. Baltimore City
Metropolitan Southern Railroad Co.
Philadelphia Perishable Products Terminal Co., The
Railease, Inc.
Real Estate and Improvement Company of Baltimore City, The
Richmond-Washington Co.
Richmond Land Co.
Schuylkill Improvement Land Co. of Philadelphia, The

Seaboard Coast Line Railroad Company
Staten Island Railroad Corp., The
Terminal Realty Baltimore Co.
Toledo, Lorain & Fairport Co.
Toledo Ore Railroad Company, The
Toledo Terminal Railroad Co., The
Washington and Western Maryland Railroad Co.
Washington County Railroad Co.
West Virginia and Pittsburgh Railroad Co.
Western Maryland Railway Co.
Western Maryland Truck Lines, Inc.
Western Maryland Warehouse Co.
Winchester and Potomac Railroad Co., The
Winchester and Strasburg Railroad Co., The

Companies Related To Bessemer And Lake Erie Railroad Company[2]

Birmingham Southern Railway Company
Carbon County Railway Company
Duluth, Missabe and Iron Range Railway Company
Elgin, Joliet & Eastern Railway Company
Johnstown and Stony Creek Rail Road Company
Lake Terminal Railroad Company, The
McKeesport Connecting Railroad Company
Newburgh & South Shore Railway Company, The
Union Railroad Company
United States Steel Corporation
Youngstown & Northern Railroad Company

Companies Related To Boston And Maine Corporation

Boston and Maine Railroad Radio Co.
Connecticut River Valley Co., Inc.
Mystic Terminal Co., The
Pine Tree Corporation

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[2] Non-rail related companies are not listed.

North Station Hotel Building, Inc.
North Station Industrial Building, Inc.
Springfield Terminal Railway Co.

Companies Related To Burlington Northern Inc.

Arden Lumber Company, Inc.
Belt Railway Company of Chicago, The
BN Transport Inc.
BNT Terminals, Inc.
BNL Development Corporation
Burlington Equipment Company
Burlington Northern Air Freight (Aust.) Pty. Limited
Burlington Northern Air Freight (U.K.) Pty. Limited
Burlington Northern Air Freight Inc.
Burlington Northern Airmotive Inc.
Burlington Northern Dock Corporation
Burlington Northern (Manitoba) Limited
Butte Pipe Line Company
Camas Prairie Railroad Company
Chicago Union Station
Clarkland, Inc.
Clarkland Royalty, Inc.
Colorado and Southern Railway Company, The
Davenport, Rock Island and North Western Railway Co.
Denver Union Terminal Railway Company
Douglas Transportation Company
Dreyer Bros., Inc.
Fort Worth and Denver Railway Company
Frisco Transportation Company
Galveston Terminal Railway Company
Glacier Park Company
Houston Belt & Terminal Railway Company
Illinois Terminal Railroad Company
International Shipping Services Inc.
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company

Ksanka Lumber Co., Inc.
Lake Superior Terminal and Transfer Railway Co., The
Lemhi Telephone Company
Longview Switching Company
Minnesota Transfer Railway Company
New Mexico and Arizona Land Company
906 Olive Corporation
Northern Resources, Inc.
Northern Rockies Pipeline Co.
Oregon Electric Railway Company
Oregon Truck Railway
Paducah & Illinois Railroad Company
Pueblo Union Depot and Railroad Company, The
Plum Creek Lumber Co.
Portal Pipe Line Company
Portland Terminal Railroad Company
Quanah, Acme & Pacific Railway Company
Royal Logging Co.
Saxony Corporation
Saint Paul Union Depot Company, The
Terminal Railroad Association of St. Louis
Trailer Train Company
Walla Walla Valley Railway Company
Western Fruit Express Company
Wichita Union Terminal Railway Company
Winona Bridge Railway Company

Companies Related To Chicago And North Western Transportation Company

Des Moines and Central Iowa Railway Company
Ford Dodge, Des Moines and Southern Railway Company
Illinois Terminal Railroad
Iowa Transfer Railway Company
Kansas City Terminal Railway
Lake Superior Terminal and Transfer Railway Co., of the State of Wisconsin, The
Minneapolis Eastern Railway Company

Minneapolis Industrial Railway Company
North Western Communications Inc.
North Western Leasing Company
North Western Locomotive Company
NW Railquip Inc.
Oshkosh Transportation Company
Peoria and Pekin Union Railway Company
Railbox Company
Railway Transfer Company of the City of Minneapolis, The
St. Paul Union Depot Company
Trailer Train Company
Western Railroad Properties Inc.
Wisconsin Town Lot Company

Companies Related To Consolidated Rail Corporation

Akron & Barberton Belt Railroad Company
Albany Port Railroad Company
Baltimore Chamber of Commerce
Belt Railway Company of Chicago, The
Buffalo Creek Railroad Company, The
Calumet Western Railway Company
Canada Southern Railway Company, The
Chicago and Western Indiana Railway Company
Detroit River Tunnel Company, The
Detroit Terminal Railroad Company
Excelsior Truck Leasing Company, Incorporated
Fruit Growers Express Company
Illinois Terminal Railroad Company
Indiana Harbor Belt Railroad Company
Jersey Central Transportation Company
Lake Erie and Eastern Railroad Company
Lakefront Dock and Railroad Terminal Company (pending)
Merchants Despatch Transportation Corporation
Monongahela Railway Company, The
Niagara River Bridge Company, The
Nicholas, Fayette and Greenbrier Railway Company
Penn Central Communications Company

Pennsylvania Truck Lines, Inc.
Peoria and Pekin Union Railway Company
Philadelphia, Reading and Pottsville Telegraph Company
Pittsburgh, Chartiers & Youghiogheny Railway Company
Relco-Pa, Inc.
St. Lawrence and Adirondack Railway Company
Terminal Railroad Association of St. Louis
Toledo Terminal Railroad Company, The
Trailer Train Company

Companies Related To Detroit, Toledo & Ironton Railroad Company

None.

Companies Related To Elgin, Joliet & Eastern Railway Company[3]

Bessemer and Lake Erie Railroad Company
Birmingham Southern Railway Company
Carbon County Railway Company
Duluth, Missabe & Iron Range Railway Company
Johnstown and Stony Creek Rail Road Company
Lake Terminal Railroad Company, The
McKeesport Connecting Railroad Company
Newburgh & South Shore Railway Company, The
Union Railroad Company
United States Steel Corporation
Youngstown & Northern Railroad Company

Companies Related To Grand Trunk Western Railroad Company

None whose stock is publicly held.

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[3] Non-rail related companies are not listed.

Companies Related To Illinois Central Gulf Railroad Company

Abex A/S
Abex Corporation
Abex Denison Limited
Abex Engineered Products Limited
Abex Ges. m.g.H.
Abex G.m.B.H.
Abex Industrial, S.A.
Abex Industries. A.B.
Abex Industries Ltd.
Abex Industries, S.A.
Abex International Holdings, Limited
Abex International, S.A.
Abex Mead, Limited
Abex Pagid Equipment S.A.
Abex Pagid Reibbelag G.m.b.H.
Abex S.A.
Almacenes Refrigerantes S.A. De C.V.
Alton Manufacturing Company
American Brake Shoe Company
American Refrigeration Products, S.A.
American Refrigeraction De Centro America, S.A.
Amsco Italinana S.p.A.
Amsco Mexicana S.A.
Au Gourmet Foods De Luxe, Inc.
Belt Railway Company of Chicago, The
Bent Creek Development Co.
Black Body Corporation
Black Diamond, Inc.
Blue Island Railroad Company
Bolingbrook 55 Corp.
Bolingbrook Plaza, Inc.
Bridgewater Machine Company
Bubble-Up Company, Inc.
Butcher Boy Refrigerator Door Co.
Centigon, Inc.
Chandeysson Electric Company

Chesley Industries, Inc.
Chicago Bank of Commerce, The
Chicago Community Ventures, Inc.
Chicago & Illinois Western Railroad Company
Chicago Intermodal Company
Compagnie pour l'Industrie Amiantiere
Compet Corporation
Cosmic Enterprises, Inc.
Cosmic Stores, Inc.
Cove Development Corporation
Covex S.r.L.
Cypress Bend Corporation
Dad's Root Beer Company
Danville Pepsi-Cola Bottling Co.
Dearborn Park Corporation
Denison Hydraulics Company, The
Denison Hydraulics India Limited
Denison Hydraulics, Japan Ltd.
Deri (Engineers) Limited
Endro, Inc.
Environ of Inverrary, Inc.
436 Corporation
Frendo-Abex S.p.A.
Fren-Do France S.A.
Fren-Do Sud S.p.A.
Frolic Homes, Inc.
Gas Welding, Inc.
Genadco Advertising Agency, Inc.
GM&O Land Company
Gulf Transport Company
H. F. Philipsborn & Co.
Haleyville Tubes, Inc.
Helvetia Leasing Corporation
Helvetia Milk Condensing Company, Inc.
Helvetia Properties, Inc.
Helvetia Redevelopment Corporation
Hi-Q Products Company
Hussmann Acceptance Co.

Hussmann Acceptance Co. Canada Limited
Hussmann Food Store Equipment Limited
Hussmann International Sales, Inc.
Hussmann (Pty) Limited
Hussmann Ontario Sales, Ltd.
Hussmann Refrigeration , Inc.
Hussmann Refrigerator Co.
Hussmann Store Equipment, Ltd.
Huth Manufacturing Corporation
IC Equipment Leasing Inc.
IC Industries, Inc.
IC Industries Finance Corporation, N.V.
IC Industries Insurance Co. Ltd.
IC Leasing, Inc.
IC Products Company
IC Sub, Inc.
Iconic, Inc.
Illinois Center Corporation
Illinois Central Export Corporation
Illinois Central Industries, Inc.
Illinois Terminal Railroad Company
Indiana Trailer Supply, Inc.
International Parts Corporation
International Parts Manufacturing, Ltd.
International Parts, Ltd.
International Stamping Company, Inc.
Jefferson Southwestern Railroad Company
Joliet Union Depot Company
Kansas City Terminal Railway Company
Ken-Craft Products, Inc.
Kensington and Eastern RR Co.
Kentuckiana Bottlers, Inc.
Kolmer Products Corporation
Krack Corporation
Krack Corporation International
Lake Winds Development Co.
LaSalle Properties, Inc.
Laura Scudder's, Inc.

Le Silencieux, S.A.
Lincoln Financial, Inc.
Lloyds Abex Limited
Lloyds (Burton) Ltd.
Merchants Realty Company of Alabama
Merchants Refrigerating Company
Merchants Refrigerating Company of California
Micas-M.T.M. Australia Pty. Ltd.
Mid-America Improvement Corporation
Midas International Corporation
Midas Muffler (Vic.) Pty., Limited
Midas Properties, Inc.
Midas Realty Corporation
Midas Realty Corporation of Canada
Midas S.A.
Midas Silencers, Ltd.
Midas Steel Processing Services, Inc.
Milady Foods, Inc.
Mississippi Export Railroad Company
Mississippi Valley Corporation
Mohawk Cabinet Co., Inc.
Muffler Corporation of America
New Orleans Great Northern Ry. Co.
Nine-O-Five Stores, Inc.
905 Wine and Spirits, Inc.
Norris Homes, Inc.
Oak Village Development Corp.
Old Brazos Forge, Inc.
1-2-3, Inc.
Paducah & Illinois Railroad Company
Parrish Bakeries, Inc.
Parmaco Products, Ltd.
Peoples Liquor, Inc.
Peoria and Pekin Union Railway Company
Pepsi-Cola Bottling Company of Cincinnati
Pepsi-Cola Bottling Company of Kenosha and Racine, Inc.
Pepsi-Cola General Bottlers, Inc.
Pepsi-Cola Kantor Bottling, Inc.

Pet Consolidated Limited
Pet Incorporated (Delaware)
Pet Incorporated (Wyoming)
Pet International Sales, Inc.
Pet Milk Company
Petsub, Inc.
Philipsborn Equities, Inc. (Del.)
Philipsborn Equities of Texas, Inc.
Port 400 Holding Company
Pullman Company, The
Royton Holdings (Pty) Ltd.
S.A. Ateliers et Fonderies B. Piret
S&T of Mississippi, Inc.
S&T South, Inc.
St. Louis Lithographing Company
Sea Nymph Corporation
Seay & Thomas of Florida, Inc.
Signal-Stat Corporation
Societa Italiana per l'Amianto S.p.A.
South Chicago Railroad Co., The
South Properties, Inc.
Southland Canning & Packing Co., Inc.
Stanray Corporation
Star Cooler Corporation
Stephen F. Whitman & Son, Inc.
Stuckey's, Inc.
Stuckey's Stores, Inc.
Sundaram-Abex Limited
Terminal Railraod Association of St. Louis
Trailer Train Company
Uni-Abex Alloy Products Limited
Valley Potato Company
Vendome Stores, Inc.
Violet Packing Co., Inc.
Waterloo Railroad Company
Winebrenner Corporation, The
Wolff Farm Supply Company

Companies Related To The Kansas City Southern Railway Company

American-Coleman Company, The
American-Coleman International Corporation
Arkansas Western Railway Co., The
Boston Financial Data Services, Inc.
Carland, Inc.
DST, Inc.
DST-Computer-Services, S.A.
Financial Mirror, Inc.
Fort Smith and Van Buren Railway Co.
Investors Fiduciary Trust Company
Joplin Union Depot Co.
Kansas and Missouri Railway and Terminal Co., The
Kansas City Southern Industries, Inc.
Kansas City Southern Transport Company, Inc.
Kansas City Terminal Railway Co.
Landa Motor Lines
Louisiana & Arkansas Railway Company
Louisiana, Arkansas & Texas Transportation Co.
Maywood and Sugar Creek Railway Co., The
Mid-America Television Company
Pabtex, Inc.
Pioneer Western Corporation
Pioneer Western Financial Corporation
Rycom Instruments, Inc.
Rice-Carden Corporation
Southern Development Co.
Tolmak, Inc.
Veals, Inc.
Western Reserve Financial Services, Corp.
Western Reserve Life Assurance Co. of Ohio

Companies Related To Louisville & Nashville Railroad Company And Seaboard Coast Line Railroad Company

Athens Terminal Company
Atlanta and West Point Rail Road Company

Atlantic Land and Improvement Company, The
Baltimore & Ohio Railroad Company, The
Carrollton Railroad Company, The
Chesapeake and Ohio Railway Company, The
Chicago and Indianapolis Coal Company, Inc.
Clinchfield Railroad Company
Columbia, Newberry and Laurens Railroad Company
CSX Corporation
Cybernetics & Systems, Inc.
Durham and Southern Railway Company
Duval Connecting Railroad Company
Evansville Connecting Railroad Company
Fort Myers Southern Railroad Company
Fruit Growers Express Company
Gainesville Midland Railroad Company
Georgia Railroad
Haysi Railroad Company
Holston Land Company, Inc.
Houston-McCord Realty Company
Kentucky Central Railway Company
L&N Investment Corporation
Louisville, Henderson & St. Louis Railway Company
Monon Coal Company, Inc.
Monon Realty Company, Inc.
Monon Transportation Corporation
Nashville and Decatur Railroad Company
North Bank Development Company
North Charleston Terminal Company
Park-N-Shop, Inc.
Richmond-Washington Company
Savannah River Terminal Company
Seaboard Coast Line Railway Supplies, Inc.
Seaboard Tampa Investment Corporation
Seacoast Transportation Company, The
South Carolina Pacific Railway Company
Tampa Southern Railroad Company
Western Maryland Railway Company
Western Railway of Alabama, The

Companies Related To Missouri-Kansas-Texas Railroad Company

Aero Stop Nut Co.
Aetna Bearing Company
AGM Exports Inc.
All Risk Management Services, Inc.
American Gage & Machine Company
Ashford Holding Corporation
Bach-Simpson Ltd.
Balteau Standard, Inc.
B-B Liquidating Company, Inc.
Bee Gee Shrimp, Inc.
Berry Brothers Limited
B. G. Shrimp Sales Co.
Bush Universal, Inc.
Capacity Managers International, Inc.
Capacity Managers International Inc. (Georgia)
Capacity Managers International Inc. (Illinois)
Capacity Managers International Inc. (New Jersey)
Capacity Managers International Insurance Agency, Inc.
Carib Reefer Services, Ltd.
Carib Services, Inc.
Chairmakers, Inc.
Coastal Oil and Gas Limited
Coordinated Transportation Company
Coral Fidelity Corporation
Cornavin Virgin Islands, Inc.
Coverage Innovators Insurance Agency, Inc.
Coverage Innovators, Ltd.
Custom Leather Services, Inc.
Darwins Alloy Castings Limited
Diamond Stylus Company Limited
Donland Development Company
E&K Oil Field Services, Inc.
Elgin Diamond Products Co.
E-R Liquidating Company, Inc.
Fidelity Adjusters, Inc.
Fort Smith Chair Company

Fulton Iron Works Company
Galveston, Houston and Henderson Railroad Company
Georgetown Seafoods and Trading Company, Limited
Guarantee Security Life Insurance Company
Hamilton Technology, Inc.
Handi-Man Distributors, Inc.
Handi-Man Industries, Inc.
Hermann Loewenstein, Inc.
HMW Industries, Inc.
Industrial Bolt & Nut Co.
Intrad Imports, Limited
Jewell Electrical Instruments, Inc.
Katy Exports, Inc.
Katy Industries, Inc.
Katy Leather Corporation
Katy Oil Company
Katy Teleswitch, Inc.
Katy Transporation Company
Kolb-Lena Cheese Co.
KT-Plas, Inc.
LaBour International Limited
LaBour Pump Co., Limited
Langloew Leathers, Inc.
Mariner Shrimp, Inc.
Marion Aviation Corporation
Midland Insurance Company
Midland Property and Casualty Insurance Company
Mid-Re Insurance Company, Ltd.
Modern Fleet, Inc.
Modern Foods, Inc.
Modern Products, Inc.
Modern Sea Foods, Inc.
Oakes Machine Corporation
Oklahoma, Kansas & Texas Railroad Company
Panhandle Industrial Company, Inc.
Pecheries Internationales de Guyane Francaise S.A. (PIDEG)
Peters Machinery Company
Process Metals Company

Pulsar International Sales Corporation
Quality Food Machinery, Inc.
Ruttonsha-Simpson Private Ltd.
Sahlman Seafoods, Inc.
San Antonio Belt and Terminal Railroad Company
Schedule Finance Corporation
Schoen Machinery USA, Inc.
Schon & Cie, Verualtungs und Vertriebs GmbH Co. KG
Seacom Sales Company, Inc.
Shrimp Group
Simpson Instrument Sales & Service, Inc.
Societe de Fabrication Europeene des Machines, S.a.r.l.
Southwestern States Management Co.
Spiral Step-Tool Company
Sterling-Salem Corporation
Sterling-Salem Export, Inc.
Time Computer, Inc.
Trans-Continental Leathers, Inc.
Transtime Watch Company, Inc.
Treaty Capacity, Inc.
Treaty Capacity Ltd.
Waldom Distributors, Inc.
Waldom Electronics, Inc.
Wallace Silversmiths, Inc.
Waltham Watch Company
Waltham Watch Company of the Virgin Islands, Inc.
W.H.E. Watch Company, Inc.
W.J. Smith Wood Preserving Company
Zuegama Limited

Companies Related To Missouri Pacific Railroad Company

Abilene & Southern Railway Company
Alton & Southern Railway Company, The
American Refrigerator Transit Company
Arkansas & Memphis Railway Bridge and Terminal Company
Belt Railway of Chicago
Brownsville & Matamoros Bridge Company

Chicago & Western Indiana Railway Company
Chicago Heights Terminal Transfer Railroad Company
Doniphan, Kensett & Searcy Railway
Galveston, Houston and Henderson Railroad Company
Great Southwest Railroad, Inc.
Houston Belt & Terminal Railway Company
Illinois Terminal Railroad Company
Jefferson Southwestern Railroad Company
Kansas City Terminal Railway Company
Mississippi River Transmission Company
Missouri Improvement Company
Missouri Pacific Airfreight, Inc.
Missouri Pacific Corporation
Missouri Pacific Equipment Corp.
Missouri Pacific Intermodal Transport, Inc.
Missouri Pacific Truck Lines, Inc.
MRT Exploration Company
Park Spring, Inc.
Pueblo Union Depot and Railroad Company, The
Ric-Con Corporation
Southern Illinois and Missouri Bridge Company
Stonegate Park, Inc.
Terminal Industrial Land Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
Trailer Train Company
Weatherford Mineral Wells and Northwestern Railway Co., The

Companies Related To Norfolk & Western Railway Company

A.C.&Y. Terminal Properties Company, The
Akron & Barberton Belt Railroad, The
Akron, Canton & Youngstown Railroad Co., The
American Rail Box Car Company
Belt Railway Company of Chicago, The
Carolina and Northwestern Railway Company
Central of Georgia Railroad Company

Chesapeake Western Railway
Cincinnati, New Orleans and Texas Pacific Railway Company
Chicago and Western Indiana Railroad
Cincinnati Union Terminal Co., The
Cleveland Union Terminals Co., The
Delaware and Hudson Railway Company
Dereco, Inc.
Des Moines Union Railway Company
Detroit and Toledo Shore Line Railroad Company, The
Erie Lackawanna Railway Company
Fairport, Painesville and Eastern Railway
Fort Wayne Union Railway Company
Fruit Growers Express Company
Green Real Estate Company
High Point, Thomasville & Denton Railroad
Illinois Terminal Railroad Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Lafayette Union Railway Company
Lake Erie Dock Company
Lake Erie and Fort Wayne Railroad, The
Lambert's Point Docks, Incorporated
Lorain & West Virginia Railway, The
Norfolk Southern Corporation
NW Equipment Corporation
New Jersey, Indiana & Illinois Railroad
Nickel Plate Improvement Co., Inc., The
Norfolk, Franklin and Danville Railway Company
Norfolk and Portsmouth Belt Line Railroad
Northern Ohio Food Terminal, Inc.
Peoria and Pekin Union Railway Company
Pittsburgh & West Virginia Railroad
Pocahontas Kentucky Corporation
Pocahontas Land Corporation
Powhatan Oil and Gas Corporation
Pullman Company, The
Scioto Valley and New England Railroad, The

Shenandoah-Virginia Corp.
South Buffalo Development Co., Inc.
Southern Railway Company
Terminal Railroad Association of St. Louis
Toledo Belt Railway Co., The
Toledo Terminal Railroad Co., The
Trailer Train Company
Union Belt of Detroit
Virginia Holding Corporation
Wabash Railroad Company
Wheeling and Lake Erie Railway, The
Winston Land Corporation
Winston-Salem Southbound Railway

Companies Related To Pittsburg & Lake Erie Railroad Company

Lake Erie & Eastern Railroad Company, The
Monongahela Railway Company
Montour Land Company
Montour Railroad Company
Pittsburgh, Chartiers & Youghiogheny Railway Co.
Pleco, Inc.
Youngstown & Southern Railway Company

Companies Related To Soo Line Railroad Company[1]

Belt Railway Co. of Chicago, The
Lake Superior Term. & Tfr. Ry. Co., The
Minnesota Transfer Railway Company
Saint Paul Union Depot Co., The
Sault Ste. Marie Bridge Company
Soo Line Equipment Company
Tri-State Land Company

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[1] There is also a relationship between Canadian Pacific Limited and Soo Line Railroad Company which will be supplied on request but cannot be described in a single term.

Companies Related To Southern Pacific Transportation Company

Alton & Southern Ry. Co., The
American Communities—Santa Barbara, Inc.
Arkansas & Memphis Railway Bridge & Terminal Company
Asociados Internacionales del & Pacifico
B L C Corporation
Bankers Leasing Corporation
Black Mesa Pipeline, Inc.
Bravo Oil Company
Central California Traction Co.
Chattell Leases, Inc.
Commetro Leasing, Inc.
Commonwealth Control, Inc.
Commonwealth Plan, Inc., The
Commonwealth Plan Leasing, Inc.
Commonwealth Plan of Puerto Rico, Inc.
Commonwealth System, Inc.
Dallas Terminal Ry. and Union Depot Co.
Evergreen Freight Car Corporation
Evergreen Leasing Corporation
Financial Leasing Corporation
Glaser, Inc.
Golden Empire Investment Corporation
Holton Inter-Urban Railway Company
Ingenieria Y Desarrollo Del Pacifico, SAdeCV
Lease Capital, Inc.
Los Angeles Union Terminal, Inc.
Louis Heller, Incorporated
Main Street Warehouse Company
Mescalero Pipeline, Inc.
Midwest Commonwealth Plan, Inc., The
Nevazona Corporation
Northwestern Pacific Railroad Co.
O'Brien & Associates, Inc.
Ogden Union Ry. & Depot Co., The
One Market Street Properties, Inc.
Pacific Fruit Express Company

Pacific Motor Transport Company
Pacific Motor Trucking Company
Pacific Petroleum Pipe Lines, Inc.
Pacific Plan, Inc., The
Petaluma and Santa Rosa R.R. Co.
Portland Terminal R.R. Co.
Portland Traction Company
Pullman Company, The
St. Louis Southwestern Ry. Co. of Texas
St. Louis Southwestern Railway Co.
San Diego & Arizona Eastern Ry. Co.
San Diego Pipeline Company
Santa Barbara—Cabrillo Corporation
Southern Ill. and Mo. Bridge Co.
Southern Pacific Air Freight, Inc.
Southern Pacific Communications Company
Southern Pacific Company
Southern Pacific Development Company
Southern Pacific Equipment Company
Southern Pacific Industrial Development Company
Southern Pacific Land Company
Southern Pacific Marine Transport, Inc.
Southern Pacific Pipe Lines, Inc.
Southern Pacific Transport Company of Texas and Louisiana
Southern Pacific Warehouse Co.
Southwestern Town Lot Corp., The
Southwestern Transportation Co.
SPPLITT, Ltd.
Sunset Communications Company
Sunset Insurance Company
Sunset Railway Company
Terminal R.R. Assoc. of St. Louis
Ticor[b]

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[b] The following are active subsidiaries of Ticor.

Alaska Title Guaranty
Cascade Microfilm Systems, Inc.
Chas. P. Young Company

Tops On-Line Services, Inc.
Trailer Train Company
Transportation Microwave Corp.
Video Microwave, Inc.
Visalia Electric Railroad Company
Worcester Plan, Inc., The

Companies Related To Southern Railway Company, Central Of Georgia Railroad Company, The Cincinnati, New Orleans And Texas Pacific Railway Company, And Carolina And Northwestern Railway Company

Airforce Pipeline, Inc.
Alabama Great Southern Railroad Company, The
Algers, Winslow and Western Railway Company

Constellation Reinsco, Inc.
Constellation Reinsurance Company
Gilcrease Hills Development Corporation
Jeffries Banknote Company
Meridian Abstract Company
McLeod Corporation
O'Flyn & Verity, Inc.
Pioneer National Title Insurance Company
Pioneer Trust Company of Arizona
Redaction Systems, Inc.
Southwest Title Company
Spring Service Corporation
Title Guarantee Company, The
Tico One Corporation
Tico 620, Inc.
Ticor Home Protection Company
Ticor Mortgage Insurance Company
Ticor 130, Inc.
Ticor Properties Corporation
Ticor Properties Corporation of Oklahoma
Title Insurance and Trust Company
Westwood Equities Corporation

Arrowood-Southern Company
Arrowood Southern Executive Park, Inc.
Atlanta and Charlotte Air Line Railway Company, The
Atlanta Terminal Company
Atlantic and East Carolina Railway Company
Atlantic and North Carolina Railroad Company
Augusta and Summerville Railroad Company
Beaver Street Tower Company
Birmingham Terminal Company
Blue Ridge Railway Company
Camp Lejeune Railroad Company
Central Transfer Railway and Storage Company
Charlotte-Southern Corporation
Chatham Terminal Company
Chattanooga Choo-Choo Company
Chattanooga Station Company
Chattanooga Terminal Railway Company
Cincinnati Union Terminal Company, The
Citico Realty Company
Danville and Western Railway Company
Durham and Southern Carolina Railroad Company
Elberton Southern Railway Company
1575 Eye Street Associates
Fruit Growers Express Company
Georgia Midland Railway Company, The
Georgia Northern Railway Company, The
Georgia Southern and Florida Railway Company
High Point, Randleman, Asheboro and Southern Railroad Company
Interstate Railroad Company
Kentucky & Indiana Terminal Railroad Company
Lenoir Car Works
Live Oak, Perry and South Georgia Railway Company
Louisiana Southern Railway Company
Macon Terminal Company
Memphis and Charleston Railway Company
Mobile and Birmingham Railroad Company
National Investment Company, The

New Orleans Terminal Company
Norfolk and Portsmouth Belt Line Railroad Company
Norfolk Southern Corporation
Norfolk Southern Industrial Development Corp.
Norfolk & Western Railway Company
North Carolina Midland Railroad Company, The
North Carolina Railroad Company, The
North Charleston Terminal Company
NWS Enterprises, Inc.
Ocean Steamship Company of Savannah
Pullman Company
Queen City Developers
Richmond, Fredericksburg and Potomac Railroad Company
Richmond-Washington Company
St. Johns River Terminal Company
700 North Fairfax Street Limited Partnership
Southern Rail Terminals, Inc.
Southern Rail Terminals of Alabama, Inc.
Southern Rail Terminals of North Carolina, Inc.
Southern Railway—Carolina Division
Southern Region Coal Transport, Inc.
Southern Region Distribution Services, Inc.
Southern Region Industrial Realty, Inc.
Southern Region Investment Company
Southern Region Materials Supply, Inc.
Southern Region Motor Transport, Inc.
South Western Rail Road Company, The
State University Railroad Company
Tennessee, Alabama & Georgia Railway Company
Tennessee Railway Company
Terminal Properties, Inc.
Terminal Railroad Association of St. Louis
Trailer Train Company
Transylvania Railroad Company
Virginia and Southwestern Railway Company
Woodstock & Blocton Railway Company
Yadkin Railroad Company

Companies Related To Union Pacific Railroad Company

Bitter Creek Coal Company
Calnev Pipe Line Company
Camas Prairie Railroad Company
Champlin Gas Pipeline, Inc.
Champlin Gas Processing Company
Champlin Indonesia, Inc.
Champlin International Petroleum Company
Champlin Peru, Inc.
Champlin Petrochemicals, Inc.
Champlin Petroleum Company
Champlin Philippines, Inc.
Champlin Pipeline, Inc.
Champlin Trading Company
Denver Union Terminal Railway Company, The
Des Chutes Railroad Company
Elk Mountain Coal Company
Hanna Basin Coal Company
Harbor Service Stations, Inc.
Kanda Development Company
Kansas City Terminal Railway Company
Longview Switching Company
Los Angeles & Salt Lake Railroad Company
Mount Hood Railway Company
Ogden Union Railway and Depot Company, The
Oregon Short Line Railroad Company
Oregon-Washington Railroad & Navigation Company
Pacific Rail System, Inc.
Pacific Subsidiary, Inc.
Portland Terminal Railroad Company
Portland Traction Company
Prospect Point Coal Company
Rock Springs Royalty Company
Rocky Mountain Energy Company
Separation Creek Coal Company
Spokane International Railroad Company
St. Joseph and Grand Island Railway Company, The

St. Joseph Terminal Railroad Company
Stauffer Chemical Company of Wyoming
Trailer Train Company
Uinta Development Company
Union Pacific Corporation
Union Pacific Foundation
Union Pacific Fruit Express Company
Union Pacific Land Resources Corporation
Union Pacific Motor Freight Company
Union Pacific Railroad Company
Union Pacific Resources Corporation
Union Pacific Resources Ltd.
Union Subsidiary, Inc.
UP Leasing Corporation
UP Subsidiary Corporation
Upland Industries Corporation
Wasatch Insurance Limited
Winton Coal Company
Yakima Valley Transportation Company

Companies Related To The Western Pacific Railroad Company

Alameda Belt Line
Central California Traction Company
Delta Finance Company Ltd.
Oakland Terminal Railway
Sacramento Northern Railway
Standard Realty and Development Company
Tidewater Southern Railway Company
WPX Freight System, Inc.

APPENDIX B

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

Nos. 80-2099, 80-2327

ABERDEEN & ROCKFISH RAILROAD COMPANY
& Other Railroads,

Petitioners,

v.

The UNITED STATES OF AMERICA and
The INTERSTATE COMMERCE COMMISSION,

Respondents.

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,

Petitioner,

v.

The UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents.

Aug. 9, 1982

Before GARZA, POLITZ and WILLIAMS, Circuit Judges

JERRE S. WILLIAMS, Circuit Judge:

Petitioners in these consolidated cases are the nation's railroads and the National Motor Freight Traffic Association (NMFTA), an organization composed of approximately 3,000 common motor carriers. We shall refer to petitioners collectively as "Carriers." The Carriers have sought review, pursuant to 28 U.S.C. §§ 2321(a), 2342(5), and 2344, of a portion of an order by the Interstate Commerce Commission (the Commission), Ex Parte No. 370, *Tariff Improvement* (June 10, 1981). As explained below, Ex Parte No. 370 introduced a new procedure for ensuring compliance with the Commission's tariff symbolization requirements. The Carriers contend that the Commission has exceeded its statutory authority under the

Revised Interstate Commerce Act, 49 U.S.C. §§ 10761(a), 10762(b), and 10762(e), in adopting the new policy. They further maintained that the regulation devised to enforce the new policy is arbitrary and capricious, in contravention of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) & (C). Having reviewed the arguments and pertinent authorities, we conclude that the new regulation is both authorized by law and supported in the record.

I. Symbolization

The Revised Interstate Commerce Act (the Act) requires carriers providing transportation or service subject to the jurisdiction of the Commission to publish and file with that agency tariffs containing the rates that are charged to shippers. *See generally* 49 U.S.C. § 10762. Regulated carriers may collect only the rates that are contained in tariffs on file with the Commission, *see* 49 U.S.C. § 10761, and departure from the filed rate schedule will subject a carrier to civil and criminal liability, 49 U.S.C. §§ 11901, 11903. The Commission is empowered to prescribe the form and manner of publishing, filing, and keeping the tariffs open for public inspection. 49 U.S.C. § 10762(b)(1). However, the Act itself clearly states that newly filed tariffs must "plainly identify" any proposed rate change and indicate its proposed effective date. 49 U.S.C. § 10762(c)(3). Normally a new tariff will become effective thirty days or, in the case of railroads, twenty days, after the carrier files it, *id.*, unless the Commission suspends the proposed rate pending the outcome of an investigation pursuant to 49 U.S.C. § 10707(a) or § 10708(a).

As authorized by 49 U.S.C. § 10762(b)(1), the Commission has promulgated regulations prescribing the form in which tariffs are to be published and filed. One such regulation governs the symbolization of changed rates, requiring that

> [t]ariff publications shall indicate changes made in existing rates, charges, classifications, rules, or other provi-

sions by use of the following uniform reference marks in connection with each such change:

or (R) to denote reductions

or (A) to denote increases

or (C) to denote changes which result in neither increases nor reductions in charges

49 C.F.R. § 1310.10(f)(1). As justified by the Commission, these requirements "are designed to allow tariff users to rely on symbolization to (1) discover changes and (2) evaluate those changes. Discovery and evaluation are vital to tariff users' rights to timely protest proposed tariff changes." 44 Fed. Reg. 60123 (1979).

Until 1979, the Commission maintained a staff that examined every proposed tariff prior to its effective date in order to uncover obvious defects in publication, including symbolization errors. Tariffs submitted without the appropriate change-denoting symbols were rejected, pursuant to 49 U.S.C. § 10762(e), and the offending carrier then had to resubmit the proposed schedule in acceptable form. Apparently in the belief that few improperly symbolized tariffs would escape this scrutiny, the Commission never sought to exact any penalty for symbolization errors discovered after a tariff had gone into effect. Rather, it merely advised the carrier of its error and requested more caution in the future.

On October 18, 1979, however, the Commission published a Notice of Proposed Rulemaking reporting a change of policy. In an order docketed as Ex Parte No. 370, the Commission explained that budgetary constraints had forced it to abandon its comprehensive tariff examination service. Thenceforth, the Commission could review only a random sample of newly filed tariffs. Since increasing numbers of inadequately symbolized increases would go undetected, the agency had concluded that stiffer sanctions were in order:

We believe it would be inappropriate for tariff users to be burdened with the onerous chore of comparing pro-

> posed tariff filings word-for-word or figure-for-figure against existing tariff matter. They should be able to rely on the accuracy of tariff symbolization. The rules proposed here would stipulate that improperly-symbolized changes which result in increases would be considered improperly published and thus invalid and uncollectable. This would offer retroactive protection to tariff users who had been effectively deprived of their right to protest by missymbolization.

44 Fed.Reg. 60123 (1979). The Notice proposed the following regulation for inclusion in the Code of Federal Regulations:

> Changes resulting in increases which are not identified by proper symbols shall be considered unlawfully published and filed and therefore invalid and not collectable. In such cases, the lawful provisions will be those which were purportedly superseded. Invalid provisions shall be cancelled by publications which shall bring forward, or properly amend, provisions which have remained in effect by reason of invalid publication.

The Notice declared further that "[c]harges assessed on the basis of the invalid provisions would be subject to the usual overcharge claim procedures." 44 Fed.Reg. 60124.[1]

Following the obligatory period in which it received comments and suggestions from interested parties, the Commission published its decision in Ex Parte No. 370, *Tariff Improvement* (August 14, 1980). Despite the predictably unfavorable response from Carriers,[2] the Commission adopted

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[1] *See generally* 49 U.S.C. § 11705. Subsection 11705(b)(1) provides that "[a] common carrier providing transportation or service subject to the jurisdiction of the Commission under Chapter 105 of this title is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under Subchapter IV of Chapter 107 of this title."

[2] The Commission reported in Ex Parte No. 370 that 52 parties, basically shippers, receivers, and their organizations, had responded favorably; 38 parties, basically carriers and their organizations, were opposed.

the proposed rule without change. The decision explained that yearly increases in the number of published tariffs had combined with budgetary and personnel constraints to make the new policy imperative. As originally proposed, the new regulation was to apply only to improperly symbolized *increases*, since unnoticed rate raises pose the greatest threat to tariff users. The decision also made it clear that claims for overcharges accruing from publication of improperly symbolized—and therefore unlawful—tariffs could be filed at any time within the ordinary three-year limitation period prescribed by 49 U.S.C. § 11706(b).

The controversial regulation was duly codified at 49 C.F.R. §§ 1300.2(a)(4), 1303.4(d)(3), 1304.2(c), 1306.5(b)(2), 1307.5(r)(1), 1308.2(a), and 1310.10(f)(5). Although it was scheduled to become effective on October 14, 1980, this Court granted a temporary stay of its operation and enforcement pending our review. The Commission subsequently denied several petitions for reconsideration of Ex Parte No. 370. *See* 365 I.C.C. 43 (1981).

II. The Commission's Authority

A. Standard of Review

In reviewing a decision of the Commission, "[w]e can ask only whether the Commission has observed the statutory limits that Congress has set for its discretion, whether its action was arbitrary or capricious, or whether its findings are supported by adequate analysis and substantial evidence in the record considered as a whole." *Missouri-Kansas-Texas Railroad* v. *United States*, 632 F.2d 392, 400 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017, 101 S.Ct. 3004, 69 L.Ed.2d 388 (1981). *See* 5 U.S.C. § 706(2)(A), (C), (E). At the outset, then, we must determine whether the Commission has remained within the statutory bounds set forth in the Act. Statutory construction normally raises only questions of law, which are freely reviewable *de novo* by the courts. *See Coca-Cola Co.* v. *Atchison, Topeka & Santa Fe Railway*, 608 F.2d 213, 218 (5th Cir. 1979).

While courts must not shirk through inertia their responsibility as final authorities on matters of statutory interpretation, "[t]he construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.'" *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S. 261, 272, 88 S.Ct. 929, 935, 19 L.Ed.2d 1090 (1968). *See also Coca-Cola Co., supra*, 608 F.2d at 222 ("[E]ven when the issue is one of pure law, such as interpretation of contracts, tariffs, regulations, and statutes, room still is present for deference to the views of administrative agencies, particularly where the understanding of the problem is enhanced by the agency's expert understanding of the industry").

B. Rejection of Tariffs

The Carriers insist that the proposed regulation exceeds the Commission's statutory authority in that it provides for retroactive rejection of tariffs and creates a private right of action on behalf of shippers who are not necessarily injured by a missymbolized increase. The new policy permits the retroactive voiding of otherwise reasonable rates, the argument continues, thereby allowing unharmed shippers to reap the windfall of up to three years in overcharges because of a printer's oversight. Of course, the contrast between a potentially major penalty and a potentially minor transgression does not lead inevitably to a conclusion that regulatory authority has been usurped. Therefore, the Carriers undertake a meticulous dissection of 49 U.S.C. § 10762(e) in support of their contention that the Act does not authorize rejection of a tariff already in effect.

Section 10762(e) provides that "[t]he Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section." The Carriers first seize upon the phrase "under this section," suggesting that since section

10762 generally governs the publishing and filing of *proposed* tariffs, the Commission can only reject a tariff submitted "under [that] section" while it is still proposed, *i.e.* ineffective. The argument is imaginative, but sophistic. Section 10762 does not confine itself to proposed tariffs; it prescribes general rules for the filing of tariffs, and they obviously must remain on file after going into effect. The section states when and how filed tariffs go into effect and requires that they remain open for inspection. Moreover, since section 10762 is the source of all tariff publication and filing requirements, any tariff, proposed or effective, must have been submitted to the Commission "under this section."

The Carriers next focus on the word "may" and submit that Congress intended for the rejection process to be discretionary, not mandatory. We fail to see how this lends any weight to the Carriers' position, however. Certainly the statute makes rejection of any tariff an act of discretion, but the Commission's election to reject *all* tariffs containing unsymbolized rate increases remains wholly authorized by this broad grant of discretion.

Third, the Carriers suggest that the word "reject" connotes an immediate refusal to accept a tariff rather than a reservation of power to discard it at any time. Insisting that the Commission cannot "reject" a tariff after it has gone into effect, petitioners cite the following language from *Delta Air Lines, Inc.* v. *CAB*, 543 F.2d 247, 268 (D.C. Cir.1976):

> Given the nature and purpose of the Board's rejection power under section 403, namely to prevent the filing of substantive nullities and tariffs suffering from technical or formal deficiencies, it is obvious why the Act does not permit rejection, as opposed to investigation, after a tariff becomes effective. As Judge Leventhal explained in *Municipal Light Boards* [v. FPC, 450 F.2d 1341 (D.C. Cir. 1971)], rejection is a ' "peremptory form of response to filed tariffs" which classically is used not to dispose of a matter on the merits but rather as a technique for calling on the filing party to put its papers in proper form and order.' We find implicit in Judge Leventhal's description a

> recognition that rejection is a regulatory device properly used only *prior* to a tariff's effective date.

The Carrier's reliance upon *Delta Air Lines* as controlling precedent, however, founders upon crucial factual differences between that case, which construed a section of the Federal Aviation Act (FAA),[3] and the case before us.

In *Delta Air Lines*, the D.C. Circuit considered a challenge by several air carriers to five orders of the Civil Aeronautics Board (CAB). The CAB had relied on section 403 of the FAA,[4] a provision similar to section 10762 of the Revised Interstate Commerce Act, to reject the airlines' properly filed tariffs on the grounds that the tariffs—which propounded the airlines' policies on carriage of hazardous cargo—were inconsistent with applicable federal air safety regulations. The Court of Appeals held that the CAB had improperly relied on section 403, a provision designed solely to set forth the *procedural* prerequisites for filing a tariff, in order to cancel the tariffs on *substantive* grounds. The Court concluded that the CAB could only challenge such substantive defects in effective tariffs by proceeding against them under section 1002 of the FAA, which empowers the CAB to determine the lawfulness of a new tariff only after providing notice and a hearing.[5] As the Court explained:

> Under the circumstances of this case rejection was not an alternative available to the Board under the Act. Absent a technical or formal defect relating to the filing, posting, or publication of a tariff, or a substantive defect that renders the tariff a substantive nullity, the Board can

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[3] 49 U.S.C. § 1301 et seq.

[4] 49 U.S.C. § 1373.

[5] Section 1002 of the FAA, 49 U.S.C. § 1482, governs "Complaints to and investigation by" the Administrator and the Civil Aeronautics Board. Its provision for suspension of a rate during an investigation into its lawfulness is comparable to that of the Revised Interstate Commerce Act, 49 U.S.C. §§ 10707, 10708.

> prevent a new, proposed tariff from becoming effective only by *suspending* it for a maximum period of 180 days, pending a *hearing* on its lawfulness. Contrary to the Board's determination, in petitioners' proposed tariffs we find no substantive deficiencies warranting rejection under section 403.

543 F.2d at 261 (emphasis original).

By contrast, the symbolization errors that form the basis for tariff rejection under the Commission's new regulation belong precisely to the type of "technical or formal defect[s] relating to the filing, posting, or publication of a tariff" that the Court noted as appropriate for rejection under section 403 of the FAA. The requirement that rate increases be symbolized on a filed tariff is not "substantive"; it does not "raise difficult issues of economic cost and common carrier responsibility," *see* 543 F.2d at 247, that invariably require investigation and discussion as aids to a decision on the merits. It is merely a procedural regulation prescribing the form in which a tariff must be published and filed, and rejection is the remedy that agencies commonly are empowered to use against tariff filings that are obviously "defective in form." *See Municipal Light Boards* v. *FPC*, 450 F.2d 1341, 1364 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989, 92 S.Ct. 1251, 31 L.Ed.2d 445 (1972), (quoted in *Delta Air Lines*, *supra*) (rejection "is appropriate where the filing is so deficient on its face that the agency may properly return it to the filing party without even awaiting a responsive filing by any other party in interest.").

Of course, the need for a symbol denoting a rate increase may not always be obvious. As petitioner NMFTA points out, *see* note 15, *infra*, ambiguities that arise during the process of amending rate classifications may create uncertainty as to whether the rate for a particular commodity has gone up or down. However, the Commission's new regulation, unlike the CAB procedure struck down in *Delta Air Lines* does not provide for peremptory rejection without a hearing. On the contrary, the Commission has clearly stated that disputes concerning improperly symbolized tariffs are subject to the formal

complaint procedures of 49 U.S.C. § 11701, which entitle a carrier charged with violating the Act to "notice of the investigation and an opportunity for a proceeding."

Fourth, and finally, the Carriers fall back on the familiar argument that Congress surely would have stated its intentions more clearly and vested a private right of enforcement in shippers had it meant for section 10762(e) to empower the Commission to void any tariff not in compliance with its "technical" requirements. This contention, at least as it bears upon the language of section 10762(e), is mystifying. Congress did create a private right of enforcement when it permitted shippers to sue "for amounts charged that exceed the applicable rate . . . contained in a tariff filed under Subchapter IV of Chapter 107 of this title." 49 U.S.C. § 11705(b)(1). As we shall see in Part C, *infra*, the question becomes whether a tariff lacking the necessary symbol should be considered as having been so filed.

As for the Carriers' wish for a clearer statement of Congressional intent, we can only reiterate that section 10762(e) authorizes the Commission to "reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section." Taken at face value, the statute would seem to empower the Commission to reject any tariff not in conformity with its regulations prescribing the form in which tariffs are to be filed. It mentions nothing about "proposed" or "ineffective" tariffs, nor does it place any time constraints on the power to reject. Turning petitioners' guns around, one might suggest that Congress surely would have limited the reach of section 10762(e) to "ineffective" tariffs had it intended such a result.

Nothing in the language of section 10762(e), therefore, indicates that the Commission may not reject a tariff that has gone into effect but has not been filed in the prescribed format. Moreover, the precedents cited by the Carriers suggest that the appropriateness of rejection as a remedy for a regulatory violation depends more upon the type of error being corrected

(*i.e.*, formal versus substantive) than upon the type of tariff being challenged (proposed versus effective). Missymbolization is a formal defect and an important one. Especially since the Commission intends to provide notice and a hearing on challenged tariffs,[6] we conclude that the Commission may reject improperly symbolized tariffs.

C. Retroactive Voidance

Having reached the conclusion that the Commission may reject improperly symbolized tariffs, we must immediately concede to an impression that the Commission's power of rejection does not lie at the heart of this dispute.[7] The Carriers' own proposals for sanctions against symbolization errors—notably fines—indicate that their primary concern is not to escape all

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[6] In *Southern Motor Carriers Rate Conference* v. *United States*, 676 F.2d 1374 (11th Cir. 1982) (amended opinion), the Court considered "whether § 10762(e) of the Interstate Commerce Act authorizes the Commission to reject or strike an effective tariff using the Tariff Integrity Board procedures." These procedures, announced in Ex Parte 367, *Tariff Integrity Board*, 49 Fed.Reg. 39558 (1979), provided for expeditious handling of disputes over whether a tariff had been filed without complying with the requirements of § 10762 or Commission regulations. The Eleventh Circuit concluded that the Act did not authorize rejection of effective tariffs through the informal proceedings proposed for use by the new Board. The Court expressly reserved, however, the issue of "whether through *formal* complaint procedures the Commission may strike a tariff retroactively for procedural publishing errors." At 1379 (emphasis added).

[7] The Commission does not even rely upon subsection 10762(e) as primary authority for its new regulation, although it insists that a defective tariff may be rejected at any time. Rather, it falls back on its power under subsection 10762(b)(1) to "prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection," and a line of authorities, discussed *infra*, holding that any tariff not in compliance with these prescriptions is unlawful and voidable.

responsibility for their errors. If the Commission were seeking to reject improperly symbolized tariffs merely by imposing a fine or notifying the offending carrier that it could no longer collect on the defective tariff until it filed a proper substitute, it appears likely that the Commission's power to reject such tariffs would have gone unchallenged. What deeply disturbs the Carriers is the potential for retroactive liability that accompanies rejection. Consequently, they insist that section 10762, however we construe its provision for rejection, certainly does not contemplate retroactive overcharge liability for rates which are reasonable but which were filed originally without the required symbol. To this argument we now turn.

As petitioners enthusiastically point out, the Commission's new policy announcing the retroactive invalidity of improperly published tariffs carrying with it the retroactive liability to shippers moves away from an impressive list of prior decisions by the Commission. Only recently the Eleventh Circuit, in reviewing a separate but very similar order by the Commission,[8] observed that "[i]n a long line of cases where shippers brought formal complaints of overcharge on grounds that the current tariff had been improperly established, the Commission held that the applicability of tariffs or rates does not depend upon strict compliance with the Commission's publication rules." *Southern Motor Carriers Rate Conference* v. *United States*, 676 F.2d 1374 at 1379 (11th Cir. 1982) (amended opinion) (citations omitted).

Yet, an agency's interpretations of practices under a statute are not carved in stone.

> [T]he Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. . . . [T]his kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a

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[8] *See* Note 6, *supra*.

> regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

American Trucking Associations, Inc. v. *Atchison, Topeka & Santa Fe Railway*, 387 U.S. 397, 416, 87 S.Ct. 1608, 1618, 18 L.Ed.2d 847 (1967). Of course, the flexibility permitted by this approach, does not permit us blithely to accommodate each new gloss placed by an agency upon its enabling legislation without troubling ourselves to inquire whether the revised interpretation, ruling, or practice remains plausibly within the authority conferred by statute. Our scrutiny of the Commission's new posture under section 10762, however, has led us to conclude that the challenged regulation is, if anything, more clearly authorized by the Act than was the Commission's former policy of denying overcharge liability for improperly symbolized tariffs.

Shobe, Inc. v. *Bowman Transportation, Inc.*, 350 I.C.C. 664 (1975), is the most recent in the line of cases cited in *Southern Motors, supra*, which state the Commission's former policy. The defendant carrier in *Shobe* published a tariff without the required symbol. When sued for overcharges by a shipper who had not discovered the defect in time to protest under the thirty-day rule, the carrier argued that mere publishing errors do not give rise to overcharge liability. The Administrative Law Judge (ALJ) disagreed, citing *Chicago, Milwaukee, St. Paul & Pacific Railroad* v. *Alouette Peat Products, Ltd.*, 253 F.2d 449 (9th Cir. 1957). Since the *Alouette* Court had held that a carrier's violation of the thirty-day notice requirement rendered the change rate unlawful, void, and uncollectible, the ALJ reasoned that a carrier's violation of the Commission's publication requirements warranted the same penalty.

The Commission disagreed. It did not explain its refusal to impose retroactive liability for a defectively published tariff as an act of discretion, however. The Commission justified its

policy by reading into the Act a curious distinction between *statutory* violations, for which the Act permitted retroactive voidance, and *regulatory* defects, for which it supposedly did not.

The distinction relied upon a subtle misreading of the Interstate Commerce Act as it read in 1975. Section 217 of the unrevised Act, 49 Stat. 560, then codified as 49 U.S.C. § 317, contained four subsections. Subsection 317(a) required the filing of tariffs, authorized the promulgation of publishing regulations, and authorized the Commission "to reject any tariff filed with it which is *not in consonance with this section* and with such regulations" (emphasis added). In short, it included rough counterparts to subsections 10762(a)(1), (a)(2), and (e) of the current codification. Subsection 317(c) contained the thirty-day notice requirement that now appears in subsection 10762(c)(3).

The Commission read the language italicized above as confining the rejection remedy to violations of "section" 317(a), which was, of course, actually a subsection. Having accomplished this semantic manuever, the opinion reasoned that while violations of the express "statutory" notice requirement set forth in subsection 317(c) justified the overcharge liability established in *Alouette*, that remedy could not be transplanted to the self-contained hothouse of "section" 317(a) and its "regulatory" offshoots. Dismissing the ALJ's assumption "that the symbolization rules are equivalent to the thirty-day notice requirement and thus that a change made in the absence of a proper symbol was void," the Commission explained that the *Alouette* court

> found that the tariff, while not filed in conformity with the law, was nonetheless the applicable tariff, and the rates contained in the tariff had to be collected by the carrier and paid by the shipper. The decision thus did not hold that the tariff was void but, rather, that the rates were unlawful because not made effective in the proper manner. Moreover, the *Alouette* decision was based on a *statutory* violation for which there was no specific administrative reme-

> dy. The remedy for a regulatory violation, rejection by the Commission, is exclusive, as is the penalty: the voiding of the tariff.

350 I.C.C. at 670 (emphasis original).

The conclusion reached in *Shobe* is unsatisfactory for at least two reasons. First, the Commission lacked persuasiveness in arguing that rejection was a "specific administrative remedy" applicable only to violations of publication regulations issued pursuant to "section" 317(a). There is no reason to suppose that the phrase "in consonance with this section" referred to anything other than the entirety of section 317. Although we customarily refer to any fragment of a statute as a section—hence our prior reference to "section" 10762(e)—Congressional draftsmen must be more careful. Drafters of the Act were familiar with the distinction between a section and a subsection;[9] certainly they would have used the right word had they intended to restrict the possibility of rejection to the "regulatory" provisions authorized by the first paragraph of section 317.

The structure of the Revised Act supports this criticism of *Shobe*. Congress clearly intended the new codification to effect no substantive changes in the law.[10] Yet the Commission's rejection authority under subsection 10762(e) of the Revised Act expressly extends to tariffs that violate "this section *or regulation of the Commission* carrying out this section" (emphasis added). In view of the presumptive continuity between the old and new codifications, then, the Commission has always had the authority to reject tariffs containing "regulatory" violations.

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[9] *See, e.g.*, § 218(a) of the unrevised codification, 49 Stat. 561, which specifically provided "for relief from the provisions of this subsection. . . ."

[10] *See* H.R.Rep. No. 95-1395, 95th Cong., 2d Sess. 9, *reprinted in* [1978] U.S.Code Cong. & Admin.News 3009, 3018. *See also* note 14 *infra* and accompanying text.

Second, *Alouette* itself drew no distinction between "statutory" and "regulatory" defects as grounds for holding a tariff unlawful and, therefore, retroactively actionable for overcharges. Rather, the court differentiated only between an "applicable" rate—that is, one that has been accepted and filed by the Commission and is, therefore, binding on both shippers and carriers—and a "lawful" rate—one filed in accordance with the Act. The Court noted that a shipper must always pay the applicable rate; but can recover overcharges if that rate proves to have been unlawful at the time of payment.

> While the acceptance for filing by the Commission of the rate makes that rate applicable, it in no way cures *any defect* which may be present either in the establishment or the reasonableness of the rate. . . . A rate which is in fact unreasonable is not made reasonable by the mere act of filing, nor does the mere act of filing make lawful a publication *not made in accordance with the provisions of the Act.* Filing does not constitute publication, or cure a defective publication.

253 F.2d at 455-56 (emphasis added).[11]

Nothing in the Commission's contrary pronouncements prior to 1978, and certainly nothing in *Alouette*, convinces us

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[11] The applicable/lawful distinction also is important to an understanding of why the Carriers err in suggesting that the new regulation undermines the "filed rate doctrine." The filed rate doctrine "forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 101 S.Ct. 2925, 2930, 69 L.Ed.2d 856 (1981). *See also Lowden* v. *Simonds-Shields-Lonsdale Grain Company*, 306 U.S. 516, 520-21, 59 S.Ct. 612, 614, 83 L.Ed.953 (1939). Originally devised as a means of ending discriminatory rebate practices, the doctrine binds both carriers and shippers to pay only the rate on file in the current tariff, *i.e.* what has been described above as the "applicable" rate. However, as the Court explained in *Middlewest Motor Freight Bureau* v. *United States*, 433 F.2d 212, 238 (8th Cir. 1970), *cert. denied*, 402

that a tariff not in accordance with the publication regulations authorized under section 10762(b)(1) of the Revised Act is any less "unlawful" than one published in contravention of section 10762(c)(3)'s notice requirement. The logic behind *Alouette* is that a tariff not filed and published in accordance with statutory or regulatory provisions is not lawfully on file with the Commission.[12] Just because the Commission does not immediately notice the defect and accepts the defective tariff does not mean that the tariff, through this mischance, becomes lawful.[13]

Perhaps the best expression of the applicable/lawful distinction occurs in a comparatively recent decision of the Commis-

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U.S. 999, 91 S.Ct. 2169, 29 L.Ed.2d 165 (1971), the doctrine creates a right to collect, but not a right to retain, unlawful charges.

> A rate which is filed with the Commission is not *ipso facto* a lawful rate. It is the *applicable* rate which the carrier must, under the compulsion of § 317(b), charge to shippers in the regular course of business. The reason for the requirement is plain. Requiring payment of rates according to published tariffs without question reduces the possibility that carriers will prefer some shippers over others, keeps interstate traffic flowing speedily without interruptions for on-the-spot disputes over rates, and encourages the channeling of those rate disputes that do arise to the Commission and the courts for adjudication. ***But merely because the carrier is bound to charge the filed rate, it does not follow that he is necessarily entitled to keep it.***

(Emphasis added). Thus, the Commission does not disturb the filed rate doctrine when it requires carriers to repay overcharges collected on the basis of improperly filed tariffs.

[12] *See Azinn & Sons Lumber Co.* v. *Long Island Railroad*, 466 F. Supp. 993, 996-97 (E.D.N.Y.1978) (following *Alouette*).

[13] In *Acme Fast Freight Inc. Common Carrier* application, 17 M.C.C. 549, 556-57 (1939), sustained, 30 F. Supp. 968 (S.D.N.Y.1940), *aff'd*, 309 U.S. 638, 60 S.Ct. 810, 84 L.Ed. 993 (1940), the Commission observed:

> If tariffs are unlawful . . . they may not lawfully be used [and] have no proper place in our files. If we are not bound to accept them and if we should accept them upon misapprehension, or

sion, *H. J. Baker Bros., Inc.—Statute of Limitations*, 357 I.C.C. 640 (1978). In *H. J. Baker Bros.*, the carrier had charged an excessive rate, violated the thirty-day notice requirement, *and* failed to symbolize the rate increase. Finding overcharge claims to be the appropriate remedy, the Commission explained as follows:

> The tariffs on file, although unlawful, specified the applicable rate which the shippers were bound to pay, pursuant to the act. The act requires strict observance of the tariff regardless of the inherent unlawfulness of the rates specified. However, when and if the rates are shown to be unlawful *for any reason*, shippers are entitled to recover the difference between what they paid under the applicable tariff, and what is subsequently determined to be the lawful rate. Since the applicable rate cannot be deemed the lawful rate merely by virtue of being on file with the Commission, the argument of the Canadian railroads that the rates assessed were the lawful rates is without merit. . . .
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> . . . *Rates and charges unlawfully established whether in the method of filing or contrary to specific commission orders are not due the carrier.*

375 I.C.C. at 644-45 (emphasis added). We conclude that tariffs not exhibiting the required symbols are not "lawfully on file." In turn, shippers may recover what has been paid pursuant to tariffs not "lawfully on file" because such charges are not "due the carrier."

One difficulty remains. The cases we have cited on this point relied on the definition of "overcharges" contained in the pre-

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inadvertently without examination or without determination as to whether they are proper subjects for filing, we may later reject them and strike them from our files.

As the Eleventh Circuit pointed out in *Southern Motor Carriers*, *supra*, a. 1379, the Commission struck the tariff involved in *Acme Freight* for jurisdictional rather than procedural reasons. The reasoning behind the Commission's statement, however, remains pertinent here.

1978 version of the Act. Section 16(3)(g) of the unrevised statute described overcharges as "charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission." Obviously, this wording gave rise to the construction, developed in *Alouette* and *H. J. Baker Bros.*, that a rate must be both "applicable" *and* included in a tariff "lawfully on file" in order to be fully collectible. Section 11705(b)(1) of the Revised Act, however, replaced section 16(3)(g) with the following wording:

> A common carrier providing transportation or service subject to the jurisdiction of the Commission under Chapter 105 of this title is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under Subchapter IV of Chapter 107 of this title.

In eliminating the words "lawfully on file with the Commission," did Congress purposefully estinguish the applicable/lawful distinction discussed above?

We are convinced that it did not. First, the legislative history of the Revised Act clearly states that the 1978 revisions wrought no substantive change in the law:

> Like other codifications undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged.

H.R.Rep. No. 95-1395, 95th Cong., 2d Sess. 9, *reprinted in* [1978] U.S.Code Cong. & Admin. News 3009, 3018.[14]

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[14] *See also Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 227, 77 S.Ct. 787, 791, 1 L.Ed.2d 786 (1957) ("[I]t will not be

Moreover, the revised wording still creates overcharge liability for charges that exceed the rate "contained in a tariff filed under Subchapter IV of Chapter 107 of this title." Since a well accepted meaning of "under" as used in legal writings is "in accordance with," section 11705(b)(1) remains subject to the interpretation that a rate increase is not collectible unless it appears in a tariff filed in accordance with section 10762 (which is part of Subchapter IV, Chapter 107) and the regulations authorized by subsection 10762(b)(1).

III. Is The Regulation Arbitrary?

The Carriers argue that the Commission's action in adopting the proposed regulation is unlawful, even if authorized by statute, because it is arbitrary and capricious. Before considering this challenge to the reasoning that underlies the Commission's decision, we note that the "arbitrary and capricious" standard is highly deferential and forbids a court from substituting its judgment for that of an agency. *Evironmental Defense Fund, Inc.* v. *Costle*, 657 F.2d 275, 282 (D.C. Cir. 1981). "If the agency considers the relevant factors and articulates a rational connection between the facts found and the choice made, the decision is not arbitrary and capricious." *Watkins Motor Lines, Inc.* v. *I.C.C.*, 641 F.2d 1183, 1188 (5th Cir. 1981). *See also City of Houston* v. *FAA*, 679 F.2d 1184 at 1189-90 (5th Cir. 1982).

Briefly, the Carriers contend that the new regulation is arbitrary and capricious because it is unnecessarily harsh when viewed against its objectives. They submit that rate symbols are mere technicalities and that shippers are likely to learn about increases through prefiling notices or new filings even without the required symbols. Thus, while perhaps use-

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inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed.").

ful, symbols are not of sufficient importance to justify extensive penalties for carriers who erroneously omit them. Certainly, the Carriers insist, the sanction adopted by the Commission—retroactive overcharge liability with a three-year statute of limitations—is out of all proportion to the seriousness of such omissions. An unscrupulous shipper lucky enough to detect an unsymbolized increase could sit on his discovery for three years and collect the windfall of a massive overcharge judgment. This is particularly capricious, the Carriers continue, since the shipper is not even required to show injury: in other words, an otherwise reasonable increase may be declared retroactively invalid up to three years after going into effect just because the carrier neglected to symbolize it. Finally, the NMFTA, which publishes the National Motor Freight Classification, complains particularly that the new regulation is arbitrary and capricious because it fails to make concessions for unavoidable errors that occur whenever a new (or newly amended) rate classification creates a dispute over which rate applies to a certain commodity.[15]

The Commission replies that efficient symbolization is crucial to tariff users' right to lodge timely protests against pro-

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[15] The National Motor Freight Classification is a catalogue of products grouped according to the similarity of their rates. As described by the Supreme Court in *Director General of Railroads* v. *Viscose Co.*, 254 U.S. 498, 503, 41 S.Ct. 151, 153, 65 L.Ed. 372 (1921),

> [c]lassification in carrier ratemaking practice is grouping—the associating in a designated list, commodities, which, because of their inherent quality or value, or of the risks involved in shipment, or because of the manner or volume in which they are shipped or loaded, and the like, may justly and conveniently be given similar rates.

The Classificaton is a tariff and must comply with the Commission's symbolization rules.

The comments on proposed rulemaking submitted by NMFTA suggested that the new rule may impose substantial liability for symbolization errors that are inevitable. According to NMFTA,

posed rate changes. Since the Commission can no longer afford to police the thousands of rate changes that are published weekly, it must shift the burden of ensuring exact compliance with symbolization requirements to the carriers themselves. It has concluded that the best means of compelling carrier to assume this burden is to adopt the new policy under which unsymbolized rate increases are considered unlawful and, therefore, void *ab initio*. The threat of substantial liability is the surest means of encouraging thorough compliance. No carrier need ever repay an overcharge, after all, if it exercises care to symbolize its rate increases as required. In defense of the three-year limitations period, the Commission points out that this is merely the time limit mandated by 49 U.S.C. § 11706(b) for any civil action to recover overcharges under § 11705(b)(1). As for the uncertainties predicted by NMFTA, the Commission responds that tariff publishers who are uncertain of a new or amended classification's ultimate effect on rates can apply to the Commission for a waiver of the symbolization requirement. Moreover, the Commission points out that it retains sufficient discretion under the new regulation to take account of special cases in determining liability.

Admittedly, the petitioners have voiced robust objections to the new regulation. Allowing shippers three years in which to file a claim for overcharges based on a symbolization error is a potentially harsh remedy. Also of concern is the absence of any injury-in-fact prerequisite to such a claim. Shippers who could not possibly have challenged a newly-filed rate increase as unreasonable may be able to secure its subsequent revocation simply because they did not have the opportunity to offer a futile protest. Moreover, a shipper with actual notice of the

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amendments to a classification may change the descriptive wording, thereby creating uncertainty as to which classification (and which rate) covers a particular product. Until this matter is settled, it may be impossible to determine whether the rate for that commodity has been lowered, been increased, or remained unchanged.

increase can seek damages for the absence of a symbol whose purpose is to provide notice.

These problems reflect severity, however, not caprice. The Commission has provided a rational explanation for its decision. Pleading necessity, the Commission has opted for what comes down to a rule of strict liability for noncompliance with its symbolization regulations. Having persuasively described the necessity of shifting monitorial duties to the carriers themselves, where the ultimate legal responsibility always has lain, the Commission is not unreasonable in concluding that overcharge liability is the most appropriate means of encouraging the carriers to check and recheck thoroughly all tariff revisions. The predicted decline in intentional or negligent symbolization errors compensates, at least arguably, for the possibility of recovery by an unharmed shipper. After all, it is clear that a carrier is not *entitled* to a rate increase, just or otherwise, that has not been filed in the prescribed manner. Moreover, the Commission is correct in pointing out that the carriers can prevent windfall recoveries simply by carefully carrying out their own legal obligation to mark their rate increases.

The need is clear for a symbol to indicate rate increases which are part of long and detailed rate schedules. The ordering of a refund for overcharges remains discretionary, however, and the Commission retains the right to fashion relief appropriate to individual circumstances.[16] Thus, with regard to petitioner NMFTA's particular objections, we do not strike down a rule as arbitrary and capricious on the basis of a suggestion that the agency might, in hypothetical situations, administer it arbitrarily and capriciously. Virtually every new regulation, no matter how easily and fairly it may work in the

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[16] *See, e.g., Genstar Chemical Ltd.* v. *ICC*, 665 F.2d 1304, 1309-10 (D.C.Cir.1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1750, 72 L.Ed.2d 161 (1982).

majority of cases, carries the possibility of an arbitrary adjudication in some future circumstance. The Commission has clearly stated that it will take action on a symbolization error only after providing notice and a hearing pursuant to 49 U.S.C. § 11701. In the concrete disputes that arise under this procedure, the Commission undoubtedly will encounter situations in which the duty to symbolize a rate as "increased" was not apparent at the time of filing. If, as the result of some future adjudication, a carrier believes that the Commission has arbitrarily struck down a tariff because of a symbolization error that was truly unavoidable, the carrier may petition for judicial review of the Commission's order on that basis. *See* 28 U.S.C. §§ 2321(a), 2342(5).

We conclude that the challenged regulation is authorized by §§ 10762(b)(1), 10762(e), and 11705(b)(1), and that the Commission's decision to exercise this authority was, in view of the facts described and reasons submitted, neither arbitrary nor capricious.

Stay VACATED and Petitions for Review DENIED.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

Ex Parte No. 370

TARIFF IMPROVEMENT

Decided August 14, 1980

Tariff publishing regulations adopted which will (1) permit tariffs to express rates and rate changes as percentages; (2) declare rate increases unlawful which result from improperly-symbolized tariff changes; (3) prescribe standard titles and item numbers for commonly-published tariff rules, and (4) allow tariffs to identify commodities and point locations by certain uniform standard code designations.

DECISION

BY THE COMMISSION:

We began this proceeding on our own motion by Notice of Proposed Rulemaking (NPR) entered October 9, 1979, and published in the Federal Register on October 18, 1979 (44 F.R. 60122).[1] Our purpose is to improve, simplify and modernize tariffs by reducing their size, complexity and cost; by standardizing their formats; and by promoting greater compatibiity with electronic technology.

Specifically, we proposed rules which would:

(1) permit tariffs to express rates and amounts of increase and reduction as percentages;

[1] The regulations proposed are set forth in appendix A.

(2) declare rate increases unlawful which result from improperly symbolized tariff changes;

(3) prescribe standard titles and item numbers for commonly published tariff rules; and

(4) allow tariffs to identify commodities and point locations by uniform standard code designations.

Interested persons were invited to submit written comments on these rules and, in response to that invitation, a total of 109 comments were received,[2] representing virtually all segments of the surface transportation community: carriers and carrier organizations, shippers and shipper associations, traffic consultants, civic organizations, port authorities and Federal agencies. A complete list of the commenters is set forth in appendix B.

After a thorough analysis and evaluation of the comments, which unanimously applauded the Commission's goals in this proceeding, we have concluded to adopt the proposed regulations with several modifications which were suggested by the commenters. These modifications, together with all relevant issues, suggestions and objections raised in the comments, are discussed below in the same order they were introduced in our NPR. The adopted regulations and a notice of this action are set forth in appendix C.

PART I: PERCENTAGE EXPRESSION OF RATES, CHARGES AND AMOUNTS OF INCREASE OR REDUCTION

This proposal was designed primarily to reduce the size and cost of tariffs and, at the same time, to give carriers the kind of tariff flexibility they will need to compete effectively in what we foresee as a substantially less-regulated environment in the future. It was predicated on the assumption that the "explicit statement of rates" required in the past is no longer necessary

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[2] Including one late-filed comment filed by Middlewest Motor Freight Bureau.

because of changed technological conditions—particularly the universal availability and use of inexpensive solid-state calculators. A substantial majority of the 92 comments which specifically addressed this proposal not only favored adoption of the proposed rules, but supported the Commission's purpose and agreed with our underlying assumption.

Opposition comments were based primarily upon two contentions: (1) that a general relaxation of the explicit statement requirement of the Interstate Commerce Act is outside the Commission's jurisdiction, and (2) that the use of percentages would have an adverse effect on the manual tariff user. Other comments, while supporting the basic concept of the proposal, took issue with the pace and scope of the relaxation and the degree of flexibility afforded by the proposed rules. Generally speaking these comments were balanced between those who thought the proposal was too far reaching and those who thought it did not go far enough. The former argued, for example, that the proposal should first be tested on a trial-tariff basis and that its use should be limited to the expression of class or class and column-commodity rates only. The latter, on the other hand, contended that the rules are unnecessarily restrictive, that they should allow the use of mathematical formula and rate-factor expression, that they should permit percentage supplements to be used in connection with master tariffs, and that the rules should be mandatory, rather than permissive.

JURISDICTION

Although only three comments challenged the Commission's authority to provide for a general relaxation of the explicit statement requirement, we believe that our position on this point must be clearly established from the outset.

Section 10762(a) of the Interstate Commerce Act (49 U.S.C. 10762(a)(2)) specifically requires that motor carrier, water carrier and freight forwarder rates be stated in "money of the United States." Previously, we held that rates must always be

stated exactly in dollars and cents, and tariff users should never have to resort to calculations to determine applicable rates. See *Rice* v. *Atchison, Topeka & Santa Fe R. Co.*, 4 I.C.C. 228, 246 (1890); *Colorado Fuel & Iron Co.* v. *Southern Pacific Co.*, 6 I.C.C. 488, 519 (1895). We now believe that this policy is unduly restrictive and, indeed, not required by section 10762(a)(2). It is our view that the initial publication of rates in dollars and cents satisfies the requirement of section 10762(a)(2).

In our NPR we cited the "universal availability and use of inexpensive, solid-state calculators" as one of the circumstances underlying this proposal. But this phenomenon is only the surface manifestation of an even larger, and more significant, set of circumstances—namely, the rapidly developing technological and educational sophistication of the American public in general and of American business in particular. Requirements and restrictions that may have been seen as absolutely necessary under the social and educational conditions prevalent in 1935, when the Motor Carrier Act was passed by Congress, are not necessarily essential now. For example, the act's tariff posting requirement, which was seen as the very cornerstone of public accessibility to rate information in the early days of this century, has today—due to changing times and conditions—largely outlived its usefulness. As the court stated in *Akron, Canton & Youngstown R. Co.* v. *United States*, 370 F. Supp. 1231 (D. Md. 1974), at page 1234:

> By 1940, with the advent of trucks and vastly improved mail, telephonic and other forms of communication, the era had ended in which shippers walked down to the local railroad depot to look at the freight rates posted at the station-house door * * *. As would seem reasonable, Congress, by enacting § 6(6) in broad language without limiting the use of the word "published" to its prior usage, gave broad authority to the ICC to prescribe the "form and manner" in which the required tariff schedules would be "published", as well as filed and posted, in order to meet changing conditions and times.

Because of these "changing conditions and times," the Commission has broadly relaxed the act's posting requirements over the last few decades.

We contend now that similar circumstances exist, because of changing conditions and times, with regard to the requirement that all rates be stated in money of the United States.

Over the last 45 years, the use of percentages has moved from what was once only a classroom exercise to a familiar and accepted facet of American daily life. The average consumer has grown accustomed to dealing comfortably with interest rates on loans, credit card purchases, and savings accounts; with retail and wholesale discounts; with mortgage rates and taxes—all expressed in terms of percentages. Clearly, the expression of figures and prices in terms of percentages has become a normal part of this country's social and business life, and it is clearly within the Commission's jurisdiction to utilize its exemption power liberally to respond to this change.

EFFECT ON THE MANUAL TARIFF USER

We realize that relaxation of the explicit-statement requirement will have an effect on manual tariff users. They will be forced, in many instances, to perform percentage computations to determine transportation charges. We do not believe, however, that this burden will be an unreasonable one. And it will be more than offset by the benefits accruing: fewer tariff pages to buy, to file and to store, lower subscription costs and, ultimately, lower freight rates.

For carriers and their agents, the relaxation will offer reduced printing, production and compilation time, and a great reduction in the use of paper. Examples of the possible savings identified by Commission studies are as follows:

> 507 pages of class rate tables in one major freight forwarder tariff could be reduced to 50 pages by utilizing the percentage-rate system.
>
> To meet the explicit-rate requirement in connection with a general increase proceeding last year, one motor

rate bureau had to publish 2,160 pages of rate tables. Because the original increase requested was suspended "without prejudice" to filing for a lower amount, 2,160 more pages of rate tables had to be filed. This is a total of 4,320 pages—all of which could have been eliminated under the percentage supplement concept advanced in the proposed rules. (The actual number of pages filed in this example was 8,640—since *two* copies of all tariff matter must be filed with us. This figure is again multiplied, of course, by the number of subscribers and member carriers receiving copies. Subscription lists for tariffs of major bureaus often run into the thousands.)

Tables of volume incentive rates, aggregate tender rates, discount rates, and rate conversion tables (e.g., those used to convert rates in cents per 100 pounds to cents per gallon), the publication of which can run anywhere from one to 50 pages, could be replaced in many instances by a single tariff item.

Despite these obvious benefits, several carrier commenters registered objections to the proposed rules on the grounds that their own rating personnel would be adversely affected. Frankly, we find it difficult to take these contentions seriously. Carriers and their agents will be under no obligation to utilize the permissive authority conferred on them by these rules. If they believe that the disadvantages of expressing their rates and rate changes as percentages outweigh the advantages—either for themselves or for their shipping customers—they are quite at liberty to continue their present practices.

We have no doubt, however, that when carriers, agents and shippers become aware of the enormous potential for savings inherent in the new regulations, they will not only accept the principle of percentage expression, but will demand that it be utilized wherever possible.

PACE, SCOPE AND FLEXIBILITY

Many shipper commenters are concerned that the proposed rules would be an open invitation for carriers to make their tariffs incomprehensibly complex. They contend that the Commission is moving much too fast and that adoption of the rules

should be preceded by further Commission and industry study, interim reports and sample percentage tariffs. While we do see a need for caution and planning in implementing the regulations (and this view is shared by almost all carriers and agents who submitted comments), we do not believe such steps are necessary. Requiring shippers to perform simple percentage calculations in order to determine applicable rates is hardly a revolutionary concept. Many carriers have had percentage provisions of one kind or another in their tariffs for several years. Within the last year, moreover, we have granted several special tariff authority applications to express rates and rate changes as percentages. For example, Bulk Carrier Conference was authorized to publish general increases in terms of a percentage figure; Southern Freight Association was authorized to provide for rate reductions by percentages; and Middlewest Motor Freight Bureau was authorized to establish commodity rates in terms of percentage amounts of class rates. The implementation of these authorities has not appeared to unduly complicate these agents' tariffs. To the contrary, we believe that most of them have not only succeed in reducing the number of tariff pages enormously, but have actually simplified the rate-checking process. Moreover, they have enabled these agents, on behalf of their member carriers, to respond to their customers' needs quickly and simply.

We have also been urged by a number of commenters to restrict the percentage-rate proposal to the expression of class, or class and column-commodity rates only. These requests are attributable, we believe, to two failures: first, the failure to foresee the potential for commodity-rate percentage publication and second, the failure to understand the true nature of this proposal.

While it is true that present class and column-commodity rate structures lend themselves more readily to *immediate* percentage-rate conversion, we are persuaded that the potential for commodity rate percentage expression is ultimately even greater. The Middlewest Motor Freight Bureau's recent grant of Special Tariff Authority was not for the conversion of

present commodity rates to percentages, but for the establishment of *new* commodity rates; and we are confident that carriers and agents will continue to formulate new and innovative ways to utilize commodity-rate percentage expression in the future.

As to the nature of this proposal, we want to make it clear from the outset that it was not intended in any way to disrupt present rate structures. It is a rate *expression* proposal, not a rate *making* one. We are fully aware that many existing rate structures—both class and commodity—simply cannot be expressed in percentage form. Most motor carriers' class rate structures under class 100, for example, no longer reflect a tautology of true percentages (i.e., where the class 70 rate is identical to 70 percent of the class 100 rate, et cetera). Thus, their tariffs could not utilize the percentage concept without severely disrupting the rate structures.

This is one of the two basic reasons why the proposed and adopted rules are permissive rather than mandatory. The other reason is simply that we have no wish to force carriers to express rates and rate changes in a manner which might be unsuitable for their own needs or incompatible with their shippers' wishes. In a less regulated future environment, carriers will need the flexibility to explore diversity, innovation and simplification, not only in their services and prices, but in their tariffs as well. If constraints and restrictions are necessary, they should be imposed by the demands of the marketplace rather than by the limitations of our regulations.

To this end, we have been persuaded by a surprisingly large number of commenters—both carriers and shippers—that the proposed rules are unnecessarily restrictive. That is, instead of protecting the tariff user from publishing abuses, the restrictions form an effective barrier against the use of the new rules and a realization of the advantages they offer. We have therefore made the following liberalizing modifications:

(1) The restrictions in sections 1300.4(i)(1) and 1310.7(a)(2), which permit conversion of a tariff to percentage-

rate expression only by reissue, has been deleted. This will allow tariffs and portions of a tariff to be converted by amendment, without unduly delaying, or increasing the cost of, utilizing the new authority.

(2) The restrictions in section 1300.4(i)(1) and 1310.7(a)(2) prohibiting expression of a rate as a percentage of a rate contained in another tariff has also been eliminated. This will permit commodity rates to be expressed as percentages of class rates, as was permitted in recent Special Tariff Authority grants.

(3) Part 1312 has been deleted, and the essential provisions of section 1312.1 have been incorporated into section 1300.9(n) and 1310.10(k), respectfully. However, the prohibitions against incorporating more than 1 percentage change; against reissuing the supplement with a same or earlier expiration date; against extending the supplement by a like supplement; and against using percentage supplements in connection with master tariffs, connecting link supplements and conversion supplements have been eliminated. The 1-year expiration date provision has been changed to a 2-year period to coincide with the updating limitation imposed on the railroads by the Commission in *Transfer of General Increases*, 358 I.C.C. 158 (1977). The provision in section 1312.1(h) exempting percentage supplements from the terms of section 1300.9(e) and 1310.9(d), which govern the number of supplements and volume of supplemental matter permissible, has also been eliminated.

The provision of section 1312.2 have been eliminated in their entirety and not incorporated into any other section. By extending the incorporation date from 1 to 2 years and allowing percentage supplements to be used in connection with master tariffs, connecting link supplements and conversion supplements, we have eliminated the necessity for a special supplement for converting rate-change percentages to explicit rates.

FORMULA RATES

Several shippers, carriers and taffic consultants have implored us to expand the rules to allow for mathematical-formula rate expression. By Special Permission No. 80-1838, decided March 19, 1980, the Commission approved a rate-expression scheme, developed by the Southern Freight Association, for determining applicable rates in one of its tariffs by use of a multistep mathematical formula. This scheme is the first ever to be approved for use in tariffs subject to our regulation. Unlike simple percentage calculations, however, mathematical-formula computations are not yet in the public domain. Usually they require not only a calculating machine, but extensive mathematical training and skill, as well. For this reason, we will continue to review any similar applications on a case-by-case basis. However, we wish to go on record as applauding past industry efforts in this area and encouraging future efforts.

PART II: SYMBOLIZATION OF TARIFF MATTER RESULTING IN INCREASES

In part II of our NPR we proposed regulations which stipulate that increases resulting from tariff changes not properly symbolized are unlawful and therefore invalid and not collectable. Of the 90 parties commenting on this proposal, 52 were in favor and 38 were opposed. Support for the proposal came basically from shippers, receivers, and their related organizations. Opposition was voiced by carriers and their related organizations. After reviewing the comments we have decided to adopt the rules as proposed without change.

DEPARTURE FROM PAST POLICY AND PRACTICE

Several commenters contend that the increased emphasis on proper symbolization of proposed rate increases is an unwarranted departure from our past policy and practice. We disagree.

The courts have often held that the Commission is free to make changes to accommodate its own needs and those of the transportation community. In *American Truck, Ass'ns.* v. *Atchison, T.&S.F.Ry. Co.*, 387 U.S. 397 (1967), for example, the Supreme Court stated:

> the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretations and overturn past administrative rulings and practices * * *. In fact, although we make no judgment as to the policy aspects of the Commission's action, this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

We are faced with tremendous yearly increases in the number of tariff filings we receive. In fiscal year 1979, for example, we received well over 100,000 publications more than we received in fiscal year 1978. The increases in the coming years are expected to be even greater. Due to budgetary and personnel constraints our tariff examination function has been sharply curtailed. It is imperative for us to alter our past rulings that improperly symbolized increases are valid and collectible, since it is now more likely that such increases will become effective. We are persuaded not only that this change is necessary for us to continue to provide a fair and prudent administration, but that its implementation is well within the limits of the law.

STATUTORY V. REGULATORY VIOLATIONS

Several commenters criticize this proposal, however, as being contrary to law. They contend that our tariff publishing rules requiring symbolization of tariff changes are regulatory, not statutory, requirements, and are thus nonsubstantive in nature. Penalties for violations of regulatory requirements,

they argue, cannot be of the same magnitude as penalties for statutory violations.

However, many of our tariff regulations embody statutory requirements. In these instances a violation of the regulations will also result in a violation of the corresponding statute. The 30-day notice requirement for filing tariffs is an example. This does not mean, however, that regulations which do *not* embody statutory requirements are trivial. They have been given considerable weight in many court cases. For example, in *Axinn & Sons Lbr. Co., Inc.* v. *Long Island R. Co.*, 466 F. Supp. 993 (1978), at pages 996 and 997, the court stated:

> The defendants argue that the amounts paid under the increased rates by the plaintiff are not 'overcharges,' as that term is defined in Section 16(3)(g) of the Interstate Commerce Act, 49 U.S.C. § 16(3)(g). That section states that 'the term "overcharges" as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission.' So the issue presented is: What tariffs are 'lawfully on file with the Commission'? The defendants admit that a tariff is not 'lawfully on file' when it has not been filed and published in accordance with the procedures dictated by 49 U.S.C. § 6. In this case it has not been so filed.
>
> Section 6 subsection 6, 49 U.S.C., specifically requires that all rate schedules be filed in compliance with 'regulations prescribed by the Commission.' The Commission has issued such regulations in 49 CFR Chap. X, Subchap. D, § 1300.52, under 'Responsibilities of carriers under tariffs.'
>
> Since the filing of the tariffs in Ex Parte Nos. 262 *et seq.*, naming LIRR, were clearly without the proper authority of LIRR, these filings were 'unlawful' under terms of the regulations (§ 1300.52) and consequently 'unlawful' under 49 U.S.C. § 6(6). Concluding, therefore, that the complained of increases were unlawful as to LIRR when originally filed, we find that plaintiffs' claim is properly one for statutory 'overcharges' and that this case is controlled by *Chicago, M., St. P. & P.R. Co.* v. *Alouette Peat Products*, 253 F.2d 449 (9th Cir. 1957) * * *.

Our regulations calling for the proper symmbolization of increases were prescribed under authorities contained in various provisions of the former Interstate Commerce Act. These authorities were recently revised, codified, and enacted without substantive change as section 10762(b) of subtitle IV of title 49 of the United States Code. Considering the findings in the *Axinn* cases, an increase which is established in violation of our tariff publishing rules can be found to be unlawful under the terms of the Commission's statute. The same finding can be made of other violations of our tariff publishing rules. Codified regulations have the force of statutory law. *ICC* v. *Appleyard*, 371 F. Supp. 168 (1974), affirmed 513 F. 2d 575 (1975), cert. denied 423 U.S. 840 (1975).

In the *Axinn* case the court found that the situation was controlled by *Chicago, M., St. P. & P.R. Co.* v. *Alouette Peat Products*, 253 F. 2d 449 (1957). In that case a finding was made that certain essentials must be met in order for rates to have final lawfulness. At page 455, the court said:

> Thus under the Act, a rate, to have final lawfulness and validity, must be lawfully established (Sec. 6, Par. 7, 49 U.S.C.A.), must be just and reasonable (Sec. 1(5), 49 U.S.C.A.) and nondiscriminatory and nonprejudicial (Sec. 3, Par. 1, 49 U.S.C.A.). Lacking any of these essentials, it cannot be the applicable rate by virtue of being on file with the Commission. While the acceptance for filing by the Commission of the rate makes that rate applicable, it in no way cures any defect which may be present either in the establishment or the reasonableness of the rate.

OVERCHARGES

Several commenters contend that handling improperly symbolized increases as overcharges is unfair and could lead to substantial overcharge liability in some instances. One party suggested that fines be levied in lieu of utilizing overcharge claim procedures. We are not convinced by the arguments put forth in the comments that some sort of alternative to overcharge claim handling is necessary or appropriate. When and if tariff provisions are shown to be unlawful for any reason,

payers of freight charges are entitled to recover the difference between what they paid under the applicable tariff and what is subsequently determined to be the lawful rate. *H. J. Baker & Bros., Inc.—Statute of Limitations*, 357 I.C.C. 640, 644 (1978).

Several parties are concerned with the fact that we did not provide a time limit for the filing of overcharge claims when improperly symbolized increases are detected. Periods of 30 and 60 days from effective dates of the violation are suggested. Some feel that the Tariff Integrity Board is already setup to handle consideration of complaints alleging improper symbolization and therefore such allegations should be brought before that Board.

We see no need to assign any time limit nor do we see that improperly symbolized increases must be considered by the Tariff Integrity Board. We are placing a great deal more emphasis on the proper symbolization of increases. Improperly symbolized increases resulting in overcharges *will* be handled under normal overcharge procedures. (See *Overcharge, Dup. Payment, or Overcollection Claims*, 358 I.C.C. 114 (1978)). Therefore, these overcharges, as is the case with other types of overcharges, will be governed by the appropriate statute of limitations. Section 11706(b) of 49 U.S.C. provides that a claimant must begin a civil action to recover overcharges within 3 years after a claim accrues. If a claim is against a rail or water carrier, a claimant may elect to file a complaint with the Commission within 3 years after a claim accrues.

PENDING COURT ACTION

Several parties are of the opinion that action of this portion of our *Tariff Improvement* rulemaking should be held in abeyance pending the outcome of the case now before the United States Court of Appeals for the Fifth Circuit involving our Ex Parte No. 367 rulemaking. As stated earlier, the proposal put forth in part II our NPR in this proceeding was an expansion of principles we adopted in Ex Parte No. 367. Since the court has not stayed the effectiveness of the rules adopted

in Ex Parte No. 367, the Tariff Integrity Board remains operational. Therefore, we see no need to hold this portion of our rulemaking in abeyance. Should it develop that any adjustments are necessary as a result of the findings of the court in the Ex Parte No. 367 case, we will promptly make them.

WHAT CONSTITUTES AN INCREASE?

Several commenters requested that we provide a clearer definition of the standards by which the tariff symbols provided in our tariff publishing regulations are to be measured. The symbols and the requirements that they be used in all tariffs have been in effect for a number of years, and tariff publishers should be familiar with the symbols and their application. However, we realize that in certain instances they may not be able to gauge the exact effect of all tariff changes. In most cases, however, the determination of whether a certain tariff amendment would result in an increase can easily be made. When publishers cannot be certain of a change's ultimate effect, they are at liberty to file applications seeking Special Permission authority to waive the symbolization requirements.

REDUCTIONS

In our NPR we also requested comments on the advisability of extending the rules proposed in part II to improperly symbolized reductions, as well as increases. Some comments supported such an extension and some comments were opposed to it.

Presently, improperly symbolized increases have a much greater potential for harm to tariff users (shippers, receivers, et cetera) than improperly symbolized reductions. In a number of cases this Commission and the courts have found that discrepancies in tariff publications are to be held against the publishers of tariffs. To hold that improperly symbolized reductions are unlawful and invalid would not be in keeping with this finding since undercharges would exist.

JOINTLY FILED TARIFFS

In comments filed by Sea-Land Service, Inc., and Sea-Land Freight Service, Inc. (Sea-Land), a request has been made that jointly filed ICC/FMC tariffs (authorized under Ex Parte No. 261, *In the Matter of Tariffs Containing Joint Rates and Through Routes for the Transportation of Property Between Points in the United States and Points in Foreign Countries)*, be declared exempt from the rules proposed in part II of our NPR. In Ex Parte No. 261, the Commission reaffirmed its jurisdiciton to regulate the traffic covered by such joint tariffs only insofar as such transportation takes place within the United States. Thus, a total exemption of jointly filed ICC/FMC tariffs from the rules proposed in part II of our NPR would not be in keeping with the Commission's findings in Ex Parte No. 261. The rules we will adopt in this part of the rulemaking will extend to the jointly filed tariffs. However, the rules will apply only on changes that are made in a division, rate or charge which accrues to the domestic carrier.

PART III: STANDARD TITLES AND ITEM NUMBERS FOR COMMONLY PUBLISHED TARIFF RULES

As part of the Commission's effort to promote uniformity and standardization of common tariff elements, we proposed in part III of our NPR to adopt regulations requiring standard titles and item numbers for all tariffs and schedules. Our purpose is not only to facilitate computer compatibility, but to enable manual tariff users to determine transportation services and charges quickly and accurately. After reviewing the comments, which almost unanimously supported the basic thrust of our proposal, we have decided to adopt the proposed rules, with only minor modifications. These modifications, together with the major contentions of the commenters, are discussed below.

SPECIALIZED CARRIERS

Automobile Transporters Tariff Bureau, Inc. (ATTB), Household Goods Carriers' Bureau (HBCB), and Heavy and

Specialized Carriers Tariff Bureau (H&SCTB) are opposed to the application of the proposed rules to tariffs published on behalf of their member carriers. They contend that standard titles and item numbers that might be compatible with general-commodity carriers' operations are not necessarily workable for the operations of specialized carriers.

We realize that the operations of the carriers participating in the tariffs published by ATTB, HGCB and H&SCTB differ from those conducted by general-commodity carriers. This is true for other types of specialized carriers, too, such as horse and film carriers. However, all motor carriers perform some services which fall under several of the general titles outlined in 49 CFR 1310.4(h)(i). For example, claims, loss and damage; detention; minimum charges; et cetera. Further, the tariffs of all motor carriers and their agents contain commonly used items which are provided for in the rule. For example, governing publications; definitions; application of tariff; et cetera.

Since the tariffs of specialized carriers do contain provisions which are covered by 49 CFR 1310.4(h)(i), they will not be exempted from the requirements of that rule. These carriers, as well as all other motor carriers, will be required to incorporate the use of the standard titles and item numbers in their tariffs within 5 years of the effective date of the regulations. Tariff items which contain provisions which are unique to the type of service provided by specialized carriers cannot be numbered with any of the numbers provided in 49 CFR 1310.4(h)(4)(i) unless, of course, the provisions of the item are covered by the general title shown opposite that number in the rule. An adequate spread of numbers exists between the prescribed item numbers to allow the publication of provisions for which a general title is not provided.

COMPLIANCE

In view of the Commission's recent change to a random sampling tariff examination program, some parties question our capacity to ensure compliance with the rules. Under the present examination program, only a random sampling of the

tariff filings we receive are fully examined. This program, however, is subject to change and/or modification. Since compliance with the standard titles and item numbers will not be required for 5 years from the effective date of the adopted rules, it would be premature for us to determine here what effect the sampling examination program will have on compliance with the new rules. Regardless of the form of our examination program in 5 years, the Commission would continue to act upon complaints from members of the public concerning noncompliance with our tariff publishing and filing rules.

Substantial support is shown for the 5-year compliance period. However, one party criticizes the period as being too long. The 5-year period was arrived at by computing the average "life" of tariffs from information submitted to the Commission in No. 35867 (Sub-No. 1), *Standard Headings and Standard Item Numbers for Commonly Published Rules and Tariffs of Class I Motor Common Carriers of Property and of Agents*. From this information we determined that the average tariff life is somewhat less than 5 years. To shorten the compliance period, however, could impose an unnecessary hardship on tariff makers. Therefore, we will maintain the 5-year period. Of course, we encourage voluntary conversion to, and use of, the standard titles and item numbers before the ultimate compliance date.

In our NPR we stated that conversion to the standard titles and item numbers could be accomplished by requiring that each new tariff or reissue tariff canceling an existing tariff utilize the standard systems. This requirement would be placed on tariffmakers before the ultimate compliance date. Schneider Transport, Inc., requested that this particular requirement not be adopted, contending that conversion to the system will be complicated and will require considerable planning on its part and on the part of other carriers. Schneider states that modifications of headings and item numbers in tariffs that are referred to in other tariffs which are not being canceled or reissued could create a number of interpretive

problems. We agree. Consequently, our order in this proceeding will be limited to the requirements that all tariffs be in compliance with the adopted title and item number rules within 5 years from the effective date of the rules. However, tariffmakers are encouraged to begin voluntarily using the prescribed titles and item numbers as soon as possible.

TARIFFS AND SCHEDULES SUBJECT TO RULES

In our NPR we proposed that all tariffs and schedules — regardless of size — be required to use the prescribed titles and item numbers. Some commenters, however, contend that tariffs of only a few pages in length should be exempted. Similiarly, they contend that the rules would impose an unnecessary burden upon carriers which publish only a few tariffs. We do not agree with these contentions. The prescribed titles and item numbers will be published in the Commission's tariff publishing rules and may be referred to by all tariff compilers. Since the purpose of the rules is to promote standardization and uniformity in *all* tariffs, the exemption of tariffs and schedules of certain sizes would not be consistent with our purpose. In any event, we are providing an ample amount of time for the transportation community to become familiar with the rules and their requirements. Any problems compilers may have with the rules should be resolved before the ultimate compliance date.

HYPHENS V. DECIMALS

In our NPR we proposed that hyphens be used between prescribed item numbers and any suffixes assigned to the prescribed items. Information contained in the comments indicates that the use of hyphens would not be compatible with existing rail carrier computer programs. Thus, a requirement that hyphens be used could result in confusion to rail programmers and disruption of existing programs. It is indicated that the use of decimals in lieu of hyphens would be a solution to this problem. Therefore, the rules to be adopted in this proceeding will allow the use of a decimal *or* a hyphen to separate prescribed item numbers from any assigned suffixes.

UPDATING STANDARD TITLES AND ITEM NUMBERS

Some parties ask who would be responsible for updating the standard title and item number rules to take into account commonly published rules which might be adopted subsequent to the conclusion of this rulemaking. After this rulemaking has been concluded, it may be reopened by petition or on the Commission's own motion at any time for the purpose of amending the title and item number rules for the inclusion of additional provisions or to change existing provisions.

The Nation's railroads suggest that the computerized tariff publishing system developed by the Joint Railroad Tariff Computerization Committee (JRTCC) should be the standard to be used in connection with rail carriers rather than the limited system prescribed by the Railroads Tariff Research Group (RTRG). Our NPR in this proceeding did not include any of the tariff publishng requirements which have been developed by the JRTCC. Therefore, it would not be in keeping with the terms of the Administrative Procedure Act to adopt here, without public notice or comment, any aspects of the JRTCC tariff publishing system. However, rail carriers may petition the Commission for the institution of a rulemaking proceeding in which the requirements of the JRTCC could be considered for inclusion in our tariff publishing rules.

OTHER CONSIDERATIONS

In its comments, Rate Comparison Services (RCS) offers several suggestions for the modification of the rules we proposed in appendix C of our NPR in this proceeding. Some of RCS's suggestions have already been treated in our preceding discussion. Other suggestions offered by RCS are discussed in the following paragraphs.

RCS criticizes proposed section 1300.4(h)(2)(i) and 1310.4(n)(4)(i) as being unclear, and offers language it feels will clarify the application of the two provisions. RCS feels that the provisions could be misinterpreted as requiring the use of all the prescribed item numbers and standard titles in all tariffs

regardless of whether or not the tariffs contain provisions covered by the items and titles. Upon review we agree with RCS that the two proposed provisions are unclear. In the adopted rules we have changed the wording of the two provisions to clarify their application.

RCS suggests that substantial revision of section 1310.7(q) be made to reflect current tariff publishing practices. This rule deals with the publication of released rates and authorities for released rates. The rule revision suggested by RCS was not a part of the rules initially proposed in this proceeding. Therefore, the general public has not had the opportunity to review or comment on RCS's proposal, as required by the Administrative Procedure Act. Consequently, it would be improper for us to adopt RCS's proposal here. However, the Commission is in the process of reviewing all of its tariff publishing rules for the purpose of consolidating the rules into one comprehensive set which would be applicable for all modes. When the review is completed, the consolidation proposal will be handled in a rulemaking proceeding. RCS will have the opportunity to present its suggested wording for section 1310.7(q) in any comments it may submit at that time. RCS may also petition the Commission for the institution of a rulemaking proceeding to consider its request for an amendment of section 1310.7(q).

RCS and other respondents offered several suggestions and requests for rearranging, retitling and adding to the standard titles and item numbers proposed in our NPR. Where we have found merit to these suggestions and requests, we have made changes in the prescribed titles and item numbers. These changes are minor and we do not see a need to elaborate on them.

Comments filed by Sea-Land point out that the standard titles and item number proposed in our NPR would conflict with the rule-numbering system adopted by the Federal Maritime Commission (FMC) in General Orders 13 and 38. Consequently, Sea-Land requests that the rules be specifically precluded from applying on export and import tariffs which are filed jointly with the FMC and this Commission.

In Ex Parte No. 261, *In the Matter of Tariffs Containing Joint Rates and Through Routes for the Transportation of Property Between Points in The United States and Points in Foreign Countries*, we reaffirmed our jurisidiction over traffic covered by these joint tariffs, but only insofar as the transportation takes place within the United States. We also adopted rules governing the filing and publishing of joint rates over international-domestic through routes. These rules were silent, however, as to standard titles and item numbers. Since the FMC has already prescribed a rule-numbering system for tariffs containing these types of rules, the adopted rules in this proceeding will exempt joint FMC-ICC tariffs from our standard titles and item number requirements.

PART IV: STANDARD TARIFF CODES FOR COMMODITY AND POINTS IDENTIFICATION

The original notice announced the Commission's intent to have its tariff requirements realistically attuned to the needs of the entire transportation community. To this end, and particularly to accommodate electronic technology through improved tariff compatibility, we proposed that two specific codes be adopted as standards for permissive use in future tariff filings. One of these codes—the Standard Transportation Commodity Code (STCC)—was proposed as the only valid tariff code for identifying commodities; the second code—the Federal Information Processing Standards Publication 55 (FIPS PUB 55)—was proposed as the only valid tariff code for identifying points or places. We proposed that both of these codes could be used "standing alone"—that is, absent the *named* commodity and absent the *named* point or place.

Of the 109 written comments received in this proceeding, all but 20 addressed the STCC code proposal, and all but 22 addressed the FIPS PUB 55 code proposal. The relevant points raised in those comments are discussed below.

Subpart (A): Standard Tariff Codes For Commodity Identification

Taken collectively, the consensus of the comments expresses a three-part central theme:

(1) The concept of establishing a standard commodity code as a utility for current or future users of electronic technology is meritorious;

(2) Stand-alone commodity codes (STCC or any other) are unacceptable to the multitude of tariff users who do not employ electronic technology; and

(3) While STCC may be entirely appropriate for rail carrier service, it is incompatible with motor carrier service.

We realize that stand-alone codes could be an impediment to those tariff users who are not geared to electronic technology. Certainly shippers, receivers, dock personnel, billing clerks, auditors and others who rely on the "written word" could be severely disadvantaged if they were required manually to translate codes to named commodities. For this reason, the rules adopted here will permit tariff commodity codes to be shown *in addition* to named commodities. However, we will not *require* commodity codes to be accompanied by named commodities.

As adopted, the rules will permit future tariffs to show:

(1) the named commodity; or

(2) the commodity code; or

(3) the named commodity accompanied by the commodity code.

We believe this will allow the carriers maximum flexibility in formatting their tariffs. Those carriers whose clients are better served by coded commodities will be free to implement such codes in their tariffs. Other clients whose interests are better met by publishing named commodities will also be accommodated. Carriers serving a mixed clientele can publish codes along with the named commodities.

One commenter raised the question of applicability on those occasions when through error a published commodity code might not be in agreement with its named-commodity counterpart. Recognizing the possibility of such a situation, the adopted rules establish a presumption that the named-commodity description is the proper one rather than the coded description. That presumption will be rebuttable on a showing of clear evidence of the commodity actually transported.

As previously noted, many commenters applaud the concept of a single tariff commodity code available to, and workable for, the users and carriers of all modes. This applause is premised on the dual realization that: (1) the failure to introduce commodity codes into tariffs is a severe hindrance to the benefits obtainable through electronic technology; but that (2) the introduction of a multitude of diverse tariff commodity codes will just as surely hinder achievement of the benefits of data exchange through electronics. Should multiple tariff commodity codes come into being, electronic communications would be extremely fragmented among the various segments of the transportation community. The users of one commodity code (be they shippers, receivers, carriers, auditors, et cetera) would find themselves isolated from the users of any other code. Thus, it is our assessment that the installation of only *one* tariff commodity code is imperative. It is on this basis that we must reject the suggestion of several commenters that multiple codes be permitted—for example, the Standard Industrial Classification (SIC), the Uniform Freight Classification (UFC), the National Motor Freight Classification (NMFC), or the Coordinated Freight Classification (CFC).

Although recognizing the value of only one permissible tariff commodity code, many comments express the concern that the STCC is not workable for the motor carrier industry. In order to resolve the concern, it is first necessary to understand the focus of the opposition to STCC. It is clear to us that—from a purely conceptual view—there is little opposition to the proposal that STCC could serve as a viable code for *identifying commodities*. The hard opposition to STCC as a successful

commodity code for motor carriers stems from the view that STCC does not permit the *ratemaking flexibility* required for motor carriers.

The perceived deficiency of STCC as a motor carrier *ratemaking* tool is perhaps best explained by one commenter, the National Motor Freight Traffic Association (NMFTA) which states:

> It is emphasized that the STCC was developed as a commodity *identifier* code, and in furtherance of that purpose the motor carrier industry is cooperating in its continued development. Nevertheless * * * it is important to note that the STCC has *not* been developed to distinguish commodities by their *transportation characteristics*, e.g., density, loadibility, value, etc.

The NMFTA (and other commenters) further explain that the STCC code frequently fails to detail those transportation characteristics which are essential to motor carrier pricing structures. For example, a STCC description may fail to distinquish between a given article of one density and the same article of different densities. Motor carrier service, however, is often subject to different rate levels dependent on density factors.

In addressing this concern, we first wish to emphasize that this rulemaking proceeding was never intended to intrude on the ratemaking decisions of the carriers. The thrust of this proceeding is to determine better means for tariffs to *present* service and pricing information after the levels of service and pricing have been determined.

We understand and appreciate the fact that the STCC code is not always precise enough to satisfy motor carrier pricing demands. Nonetheless, we believe that the goal of a single tariff commodity code is commanding, and we are persuaded that no other known code would be more appropriate to the transportation community at large than the STCC code.

We also hold a strong expectation that in the foreseeable future the STCC code will undergo an evolutionary process

that will render it far more compatible with motor carrier pricing. This process is being spearheaded by the Transportation Data Coordinating Committee (TDCC), a nonprofit organization comprised of shippers, carriers of all modes, and other interested companies that seek to advance the state-of-the art of tariff modernization and simplification. A current priority of the TDCC is the development of a standard intermodal commodity descriptions list which gives consideration to transportation attributes (which, as used here, are synonomous with "transportation characteristics") as well as commodity attributes. The design of the structure contemplates use of the commodity groupings of the STCC tariff, working in concert with commodity attributes and transportation attributes, in order that tariff users of all modes may achieve rating/pricing capabilities. The TDCC envisions that the continued development and maintenance of that product would remain in the private sector under the Standard Transportation Commodity Code Technical Committee which might be expanded to include wider shipper and carrier representation. Although it may be somewhat premature to place total confidence in the plans of the TDCC, successful completion of that program would appear to resolve the misgivings of the motor carrier industry against the use of STCC as the single valid tariff commodity code. In this regard, we endorse all efforts leading to the intermodal acceptance of STCC.

We recognize that adoption of the STCC code might, at this time, be of practical value primarily to the rail industry and its users. On the other hand, many shipper organizations (including Bethlehem Steel, Proctor & Gamble, the Department of Defense and the General Services Administration (GSA)) support STCC as being viable for all modes. Even the motor carrier industry is not unanimous in resistance to STCC. The Middle Atlantic Conference (MAC), representing some 950 motor common carriers, does not object to the permissive use of STCC as the only valid code. Similarly, a major motor carrier, Roadway Express Inc., voices no opposition to STCC, stating: "When the motor freight industry accepts STCC num-

bers for rating, product descriptions can be used to move freight."

We wish to clarify one additional point. Several comments express concern that adoption of STCC as the only permissible code will result in the prohibition of the use of classification "item numbers" as an integral part of *named* commodity descriptions. For example, a current commodity descriptor might read:

> Cushions, pads or pillows, as described in items 55220 through 55233 of NMFC.

Since we have no desire to disrupt current commodity descriptions established in the tariffs, the continued use of classification item numbers as an integral part of a named commodity description will not be viewed as being contrary to the installation of STCC as the only permissible code.

SUBPART (B): STANDARD TARIFF CODE FOR POINTS IDENTIFICATION

The comments not only express widespread opposition to the adoption of FIPS PUB 55 as a standard permissible points code for tariffs, but they indicate substantial support for adoption of the Standard Points Location Code (SPLC), instead. Moreover, the majority of commenters contend that no points code should stand alone—i.e., that any points code should be *in addition* to the *named* tariff point.

The extensive opposition to adoption of FIPS PUB 55 was not unexpected. In view of the fact that FIPS PUB 55 is a relatively new code product, it follows that it has not yet gained either wide acceptance or extensive utilization. In contrast, the SPLC has been in vogue in the transportation community for a number of years and—at no small cost—has been implemented by many carriers and organizations to meet their data transmission needs. Understandably, there would be strong resistance by the current users of SPLC against any other code perceived to be a threat against the continued use of SPLC. We appreciate the nature of that resistance and are

extremely sympathetic to the apprehension of the users of SPLC who seek adoption of that code rather than any other.

Nevertheless, in our duty to prescribe meritorious tariff regulations we must consider long-term as well as short-term results. To this end, it is our considered opinion that FIPS PUB 55 will, in time, become the most recognized and widely used points code in domestic use in the Nation. If this assessment is accurate, any endorsement at this time of SPLC as the only valid tariff code would ultimately prove to be a gross disservice, since users relying on that endorsement would later find they had installed a code system at variance with what would then be the most widely accepted points code, namely FIPS PUB 55.

Our assessment of the future role of FIPS PUB 55 is premised partly on a known fact, and partly on a projection of the significance of that fact. The fact is that FIPS PUB 55 is to be made a *mandatory* standard code for points identification for use throughout the *Federal* sector. Our information is that, pursuant to Public Law 89-306, the mandate for FIPS PUB 55 will be implemented not later than during fiscal year 1981. The significance of this mandate is that once Federal agencies are required to adopt FIPS PUB 55, those same agencies will, in turn, cause their private sector contacts to adopt and utilize it. The pervasive influence of the mandated FIPS PUB 55 on the transportation community seems obvious. As manufacturers and shippers seek to provide services or goods to, or on behalf of, the Federal agencies, communications detailing the location of those services or goods will be required to be made in FIPS PUB 55. Carriers handling the movement of those goods will also be required to utilize the code.

To underscore our assessment of the future use of FIPS PUB 55 in the Federal sector, we are aware that at least one agency—GSA—has already implemented the code and, in its comments in this proceeding, fully endorses FIPS PUB 55.

We also wish to stress that FIPS PUB 55 is not a government-created code. Rather, the Federal Government is

adopting a code developed and approved by the American National Standards Institute (ANSI), an organization drawn from the private sector. Essentially then, resistance to FIPS PUB 55 by the transportation community is resistance to a voluntary standard agreed on by a mix of business communities under ANSI stewardship. Although we recognize that our decision will not be wholly popular, we must serve the advocacy of only one points code, and for reasons expressed above, feel compelled to join the ranks of the ANSI and Federal agencies in support of FIPS PUB 55.

We are eager to minimize any adverse impact on SPLC users by adoption of FIPS PUB 55. It is for this reason that the Commission has entered into a partnership with two other sister agencies in the development of a one-for-one "bridge" from the SPLC code of FIPS PUB 55. Upon completion of this bridge, users of SPLC may continue to utilize that data transmission network while, at the same time, they will also have available the capability to interface with FIPS PUB 55.

We recognize that it would be inappropriate to endorse FIPS PUB 55 prior to: (1) its mandated use in the Federal sector, and (2) the completion of the bridge. For this reason, effectiveness of FIPS PUB 55 as the only permissible tariff points code will be delayed until June 30, 1981 by which time use of the code should be appropriate.

Although FIPS PUB 55 was selected by ANSI as the chosen code over other code candidates (including SPLC), several commenters argue that SPLC is a superior code for transportation purposes and that, consequently, SPLC should prevail as the only acceptable tariff points code. As discussed below, we have considered such arguments and conclude that there is no sound reasons to favor SPLC over FIPS PUB 55 at the risk of being aloof from the standard points code adopted by other business communities and by the Federal sector.

One argument offered in support of SPLC as the preferred code is the fact that Canadian and Mexican points are given consideration by that code whereas FIPS PUB 55 is limited to

points within the United States. That is true at this time, but our information is that Canadian and Mexican codes are being developed as part of an international system that will be compatible with the American FIPS PUB 55. Any advantage of SPLC because of its coding of Canadian and Mexican points will be relatively short-lived as the international code system comes to fruition. Moreover, during the pendency of that future coding system, we will be receptive to carrier requests for special permission authority to implement other recognized codes in tariffs where the situation warrants.

One commenter argues that FIPS PUB 55 "contains many points that are not transportation points." The complaint seems to be that FIPS PUB 55 lists too many points. We are puzzled by this challenge (which is not further explained) since, in our view, it is at least theoretically possible for freight to move from or to any place, site or locale in the United States. Another complaint heard is that the current edition of FIPS PUB 55 fails to contain many transportation locations named in the rail carriers' "Open and Prepay Station List." We believe we can quickly dispel any anxiety on this point. The National Bureau of Standards (NBS), U.S. Department of Commerce, which administers FIPS PUB 55 has assured us that they will extend maximum cooperation in establishing bona fide "transportation locations" in the FIPS issue. This willingness on the part of NBS also extends to points currently named in the SPLC code which may not yet be included in the FIPS PUB 55 file.

Some commenters argue that SPLC is designed to reveal geographical relationships between its coded points, whereas FIPS PUB 55 is said to lack this feature. To illustrate, the six-digit SPLC code allows identify of a "region" (for example, the Rocky Mountain Region) as well as identify of the State, county and point itself. In contrast, the 10-character FIPS PUB 55 contains no "region" distinguisher. We are not persuaded that failure of the FIPS PUB 55 to provide for "regions" is a telling flaw. We believe that the identity of a State, county and point is sufficient to induce a geographical location that can

be related to another State, county and point without a need for yet another "locator"—the region.

Although commenters suggest that the "region" capability of the SPLC is a vital aid to market analysis, we have been given no data which would reveal how extensively used this tool may be. Nor have we been given any data by which to measure whatever impact the absence of such a specific tool might have.

Several commenters also focus on the fact that SPLC is structured to permit six digits to identify the region, State (or portion of a State), the county, and the point itself, whereas 10 digits are required in the FIPS PUB 55 to provide the same information. The greater number of digits required by the FIPS code is said to be more cumbersome and, thus, more expensive to users. We agree that the greater number of digits required by the FIPS code is likely to be somewhat more costly to users than would SPLC. But no facts or data are presented which would quantify whatever excess costs might be involved. Thus, we have no idea whether such costs would be minimal or exhorbitant. Moreover, we are influenced by the fact that SPLC was one of the code candidates rejected by ANSI in favor of FIPS PUB 55. We must assume that the business community represented by ANSI is no less desirous of holding down operational costs than is the transportation community. In any event, we are persuaded that any gain achieved through future use of SPLC would be more than offset by the disadvantages of being at odds with the standard place code favored by the balance of the business community—i.e., FIPS PUB 55.

Based on the same rationale expressed in our earlier discussion concerning commodity codes, we will permit carriers the freedom to design their tariffs in the manner best suited to meet the needs of their users: where stand-alone codes are preferred, they will be permitted; where codes are not desirable, tariffs may continue to rely exclusively on named points; where named points working in tandem with codes are preferred, they too, will be allowed.

RELATED ISSUES AND RECOMMENDATIONS

We want to emphasize that the decision in this proceeding does not in any way mark the end of our tariff improvement efforts. Nor do the regulations adopted here preclude our consideration of the many additional suggestions and recommendations voiced in the comments which, although outside the strict parameters of our proposed rules, are directly related to tariff improvement, simplification and modernization.

We have been urged, for example, to adopt a ten-point tariff modernization program developed by the TDCC. This program, as reflected in TDCC's recently published "Phase II Final Report," calls for the development of:

1. A Tariff Locator Guide
2. Improved Distribution and Maintenance Procedures for Tariff Data
3. Standardized Intermodal Commodity Descriptions
4. Processible Rules, Exceptions and Reference Marks
5. Route Coding and Expression Standards
6. Geographic Coding
7. Tariff Data Exchange Formats
8. A Strategic Plan for Elimination of Obsolete Tariff Material
9. Territorial Application
10. Electronic Data Interchange (EDI) Formats.

Other recommendations include the adoption of rules which would permit the filing of microfiche tariffs and "national" rules, grouping and rate basis tariffs; which would amend 49 CFR 1300.7 to provide for alternation of rates with rate factors; and which would phase out rail master tariffs and motor carrier conversion supplements. The Railroads, on the other hand, have urged us to restore their conversion-supplement authority which was withdrawn in Ex Parte No. 326, *supra*.

We are directing the Commission's staff to study and evaluate these, and other, suggestions to determine whether or not

they are sufficiently consistent with our tariff improvement goals, and with the action taken here, to warrant a future reopening of this proceeding.

FINDINGS AND CONCLUSION

The regulations adopted reflect our consideration of all the comments received in response to our NPR. They will, we believe, substantially reduce the size and cost of tariffs; ensure consumer protections in the face of Commission budgetary restraints; promote tariff standardization and uniformity; encourage electronic technology compatibility; and afford carriers and forwarders greater flexibility to meet the commercial urgencies of a more competitive environment.

We find:

(1) The Commission has the requisite authority under section 553 of the Administrative Procedure Act (5 U.S.C. 553) and section 10762 of the Interstate Commerce Act (49 U.S.C. 10762) to prescribe the regulations set forth in the attached notice.

(2) The regulations adopted are necessary, warranted, and in the public interest.

(3) This action will not significantly affect either the quality of the human environment or conservation of energy resources.

VICE CHAIRMAN GRESHAM, dissenting in parts:

Adoption of the FIPS PUB 55 as the standard permissible points code for tariffs is premised on its anticipated widespread future use and adaptation to the needs of transportation. However, the SPLC has been proven its worth and flexibility. While the FIPS PUB 55 might require costly conversion for users and future adjustments in the code itself, the adoption of the SPLC as the standard permissible points code would create no such problems. The FIPS PUB 55 can always be used parenthetically with named points. If it becomes more prevalent in transportation uses in the future, its adoption as the

standard code can be subsequently exammined without the variables which seriously question the value of mandating its use at this time.

COMMISSIONER STAFFORD, dissenting in part:

Commissioner Stafford dissented in part I of the report because he did not believe that section 10762(a)(2) of the Interstate Commerce Act permits the Commission to allow carriers to express rates as percentages of an initial filing.

It is ordered:

Chapter X of title 49 of the Code of Federal Regulations is amended as set forth in appendix C.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, Alexis, and Gilliam. Vice Chairman Gresham dissenting in part with a separate expression. Commissioner Stafford dissenting in part with a separate expression.

AGATHA L. MERGENOVICH,
(SEAL) *Secretary.*

APPENDIX A

Proposed Rules to Govern Percentage Expression of Rates, Charges and Amounts of Increase or Reduction

We proposed to amend 49 CFR, chapter X, supchapter D, as follows:

1. By revising section 1300.4(i)(1) to read as follows:

§ 1300.4 CONTENTS OF TARIFFS

Tariffs shall contain, in the order named:

* * * * * * *

(i) A statement of the rates and the places from, to, and between which they apply, arranged in a simple and systema-

tic manner. At least one of the rates shall be explicitly stated (per 100 pounds, ton, car or other unit) in dollars and cents in lawful money of the United States. Other rates in the tariff may be expressed as percentages of the stated rates, provided that the tariff clearly explains how to compute the other rates, including how to dispose of fractions. A rate may not be expressed as a fraction or multiple of another rate, as a percentage of rate contained in another tariff, or as a percentage of another rate which is itself expressed as a percentage. A tariff may be converted to percentage-rate expression only by reissue, not by amendment.

2. By adding section 1300.9(n) to read as follows:

§ 1300.9 AMENDMENTS AND SUPPLEMENTS

* * * * * * * *

(n) *Percentage supplements to provide general rate changes.* A supplement, which expresses the amount of change as a percentage by which the tariff's explicitly stated rates and charges are to be increased or reduced, may be filed to any tariff to provide a general change in the level of all or substantially all rates and charges, or all or substantially all the rates and charges in a specific category in the tariff. This supplement will be subject to the regulations contained in part 1312 of this chapter.

3. By deleting the first two sentences and the first word of the third sentence of section 1310.7(a)(2), and replacing them with the following:

§ 1310.7 STATEMENT OF RATES (RULE 7)

(a) *Rates must be clear and explicit.*

(1) * * *

(2) The rates and the places from, to, and between which they apply shall be arranged in a simple and systematic manner. At least one of the rates shall be explicitly stated in dollars and cents in lawful money of the United States. Other rates in

the tariff may be expressed as percentages of the stated rates, provided the tariff clearly explains how to compute the other rates and how to dispose of fractions. A rate may not be expressed as a fraction or multiple of another rate, as a percentage of a rate contained in another tariff, or as a percentage of a rate which is itself expressed as a percentage. A tariff may be converted to a percentage-rate expression only by reissue, not by amendment. All explicitly stated rates * * *

* * * * * * *

4. By deleting section 1310.7(c) which now prohibits the expression of class rates as percentages, fractions or multiples of another rate.

5. By adding section 1310.10(k) to read as follows:

§ 1310.10 AMENDMENTS (RULE 10)

* * * * * * *

(k) *Percentage supplements to provide general rate changes.* A supplement which expresses the amount of change as a percentage by which the tariff's explicitly stated rates and charges are to increased or reduced may be filed to any tariff to provide a general change in the level of all or substantially all the rates and charges, or all or substantially all the rates and charges in a described category in the tariff. This supplement will be subject to the regulations contained in part 1312 of this chapter.

6. By adding part 1312 to read as follows:

PART 1312—PERCENTAGE SUPPLEMENTS

§ 1312.1 PERCENTAGE SUPPLEMENTS TO PROVIDE GENERAL RATE CHANGES

(a) A percentage supplement shall contain an application provision reading substantially as follows:

> "Except as provided in subsequent amendments to this tariff, all explicitly-stated rates and charges in this tariff

are [specify whether increased or reduced] as follows for the period this supplement is in effect."

The supplement shall state where any exceptions to its application are listed. If not all of the explicitly stated rates are being changed, the provisions shall state the exact category of rates being changed or list the items, sections, et cetera, of the tariff which contain them.

(b) The supplement shall show how to compute the increased or reduced rates from the percentages shown; how to dispose of fractions; and how to compute multiple factor rates made by the use of arbitraries or other means.

(c) The supplement shall have an expiration date which must be within 1 year from its effective date. The title page shall indicate, in the top margin, whether the changes are increases or reductions. If both, "as indicated" shall be added, and the different categories of changes shall be appropriately referenced.

(d) Only 1 percentage supplement to a tariff may be in effect at one time. A percentage supplement may not be reissued with the same or an earlier expiration date unless the Commission requests its reissue. The application of changes in a percentage supplement may not be extended by a like supplement providing essentially the same increases or reductions. A percentage supplement reflecting a change in the general rate level may, however, cancel the preceding percentage supplement reflecting a change in the general rate level and incorporate that change (and related provisions) into the new percentage supplement. No percentage change may be so incorporated more than once.

(e) Only matter concerning the percentage change and its application may be published in the supplement.

(f) An exception item or note may not be republished from the percentage supplement into a regular supplement of a bound tariff or incorporated into the tariff proper of a looseleaf tariff.

(g) Tariff amendments containing explicitly-stated rates or charges becoming effective during the effectiveness of a percentage supplement shall state whether or not they are subject to the provisions of the percentage supplement.

(h) Percentage supplements shall be exempt from the terms of sections 1300.9(e) and 1310.9(d) governing the number of supplements and volume of supplemental matter permissable.

(i) The provisions of this section do not authorize the publication and filing of so-called master tariffs or connecting link supplements, and percentage supplements may not be filed to tariffs which refer to a master tariff for the application of increases or reductions.

(j) Percentage supplements may change tariff matter which will not have been in effect for 30 days. Subsequent amendments filed prior to the effective date of the percentage supplement may change or cancel, on lawful notice, matter changed by the percentage supplement before that change has been in effect for days.

§ 1312.2 SUPPLEMENTS TO TRANSFER RATE CHANGES FROM PERCENTAGE SUPPLEMENTS INTO BASE RATES

(a) A supplement (not a percentage supplement) may be filed to a bound tariff for the primary purpose of incorporating into the explicitly stated base rates all applicable changes effected by use of a percentage supplement filed under section 1312.1 of this part. The supplement may contain other matter brought forward from prior supplements, provided those supplements are canceled. The supplement shall bring forward all explicitly stated rates in the original tariff and prior supplements even though some rates already include all applicable increases or reductions effected by means of percentage supplements.

(b) The title pages of supplements issued under authority of this section shall bear the following notation:

> "Issued under authority of 49 CFR 1312.2 This supplement contains all the explicitly-stated rates and charges provided by this tariff in effect on the effective date of this supplement."

(c) This paragraph applies to rail carriers only. If different increases or reductions apply on related articles shown in an item or descriptive listing of commodities, the rates may be brought forward into the supplement on the basis of the increases or reductions applying to the predominant article in the item or description, provided that a statement is included in the supplement that this has been done. The rate changes shall be appropriately referenced except as specified in paragraph (d) of this section for exceptions concerning symbolization.

(d) Symbolization of the increases and reductions (see sections 1300.4(m) and 1310.10(f)) resulting from the normal rounding off of fractions, or from the use of predominant article authority in the case of rail carriers, may be omitted in the supplement providing the supplement is filed on not less than 45 days' notice and the title page of the supplement also bears the following statement:

> "This supplement contains changed basis of rates, charges and provisions which result in increases and reductions. The supplement also contains variations in wording which result in no change in the rates and charges. These changes are not shown by use of uniform symbols which have been omitted under authority of 49 CFR 1312.2."

(e) Supplements issued under authority of this section shall be exempt from sections 1300.9(e) and 1310.9(d) governing the number of supplements and the volume of supplemental matter permissible.

PROPOSED RULES TO GOVERN SYMBOLIZATION OF CHANGED TARIFF MATTER RESULTING IN INCREASES

We propose to amend 49 CFR 1300, 1303, 1304, 1306, 1307, 1308 and 1310 by adding the following new paragraph to be designated, respectively, as section 1300.2(a)(4), section 1303.4(d)(3), section 1304.2(c), section 1306.5(b)(2), section 1307.5(r)(1), section 1308.2(a) and section 1310.10(f)(5):

Changes resulting in increases which are not identified by proper symbols shall be considered unlawfully published and filed and therefore invalid and not collectable. In such cases, the lawful provisions will be those which were purportedly superseded. Invalid provisions shall be cancelled by publications which shall bring forward, or properly amend, provisions which have remained in effect by reason of invalid publication.

PROPOSED RULES TO GOVERN STANDARD TITLES AND ITEM NUMBERS FOR COMMONLY PUBLISHED TARIFF RULES

We propose to amend 49 CFR Chapter X, Subchapter D as follows:

1. By revising section 1300.4(h)(2) to read as follows:

§ 1300.4 CONTENT OF TARIFFS

* * * * * * *

(h) *Rules governing the tariffs.*

(1) * * *

(2) (i) Each rule shall be assigned the appropriate item number and title from the following list. If a title includes subjects not treated in the rule, those subjects may be eliminated from the title.

Item	*Title*
5	Description of Governing Classification, Exceptions and Rules Tariffs
10	Station List and Conditions
15	Explosives, Dangerous Articles
20	Reference to Tariffs, Items, Notes, Rules, etc.
25	Terminal or Transit Privileges or Services
30	Perishable Freight
35	Transfer Between Connecting Carriers
40	Consecutive Numbers
45	Capacities and Dimension of Cars
50	Combination Rates
55	Substitution of Motor Service for Rail or Water Service
60	National Service Order Tariff
65	Proportional Rates-application
70	Alternation
75	Method of Canceling Items
80	Intermediate Application—origin
85	Intermediate Application—destination
90	Fourth Section Authorities
100	Method of Denoting Reissued Matter in Supplements
105	Straight or Mixed CL Application

(ii) A carrier or agent may assign a title and number of its choosing for matter not listed in subparagraph 2(i), provided the title and number chosen do not conflict with those listed.

(iii) If a title in subparagraph 2(i) does not properly identify a rule's content, qualifying words, phrases or subtitles may be added. When qualifying words or phrases are used, the prescribed title shall be followed by a dash and the added words, for example: "Alternation—C.L. Rates—Varying Minimum Weights." Subtitles or references to excepted classification rules shall follow the title.

(iv) When it is necessary or practicable to split a rule into two or more parts, the prescribed item number may be subdivided. The first part of the rule (which shall contain the

general or master rule, if any) must be assigned the prescribed item number without a numerical suffix. Each subdivision shall be assigned a compound number, which shall be constructed by use of the prescribed number followed by a hyphen, then a new series of numbers, for example: item 70-1, 70-2, 70-3, et cetera, in numerical sequence. Each subdivision must show the prescribed title.

(v) Exceptions to a rule may be included in the general rule or arranged in items immediately following the rule to which exception is taken. In the latter case, exception items are to use the standard item number of the general rule followed by a suffix—for example, exceptions to item 85 would use items 85-1, 85-2, et cetera.

2. By revising section 1307.5(1) to read as follows:

§ 1307.5 FORM AND CONTENT OF SCHEDULES

* * * * * * *

(1) *Rules.* (1) Rules and other provisions affecting rates and charges shall be published following the index of points. Each rule or regulation shall be given a separate item number. Where the subjects shown in section 1310.4(h)(4)(i) of this chapter are to be provided for in schedules, the rules covering them shall bear the titles and be assigned the item numbers listed in section 1310.4(h)(4)(i) of this chapter.

(2) A carrier may assign a title and number of its choosing for matter not listed in section 1310.4(h)(4)(i) of this chapter; provided the title and number chosen do not conflict with those listed.

(3) If a title listed in section 1310.4(h)(i) of this chapter does not properly identify a rule's content, qualifying words, phrases or subtitles may be added. When qualifying words are used, the prescribed title shall be followed by a dash and the added words, for example: "Bills of Lading — Order Notify." Subtitles or references to excepted classification rules shall follow the title.

(4) When it is necessary or practicable to split a rule into two or more parts, the prescribed item number may be subdivided. The first part of the rule (which shall contain the general or master rule, if any) must be assigned the prescribed item number without a numerical suffix. Each subdivision must be assigned a compound number, which shall be constructed by use of the prescribed number followed by a hyphen, then a new series of numbers—for example, items 390-1, 390-2, 390-3, et cetera, in numerical sequence. Each subdivision must show the prescribed title.

(5) Exceptions to a rule may be included in the general rule or arranged in items immediately following the rule to which exception is taken. In the latter case, exception items are to use the standard item number of the general rule followed by a suffix—for example, exceptions to item 510 would use items 510-1, 510-2, et cetera.

* * * * * * *

(3) By adding the following sentence at the end of section 1309.1: "Rules contained in tariffs shall be numbered and titled using the system prescribed either in section 1300.4(h)(2)(i) of this chapter or in section 1310.4(h)(4)(i) of this chapter."

(4) By adding the following subparagraph (4) to section 1310.4(h):

§ 1310.4 FORM, SIZE, AND PRINTING (RULE 4)

* * * * * * *

(h) * * *

(4)(i) Each rule shall be assigned the appropriate item number and title from the following list. If a title includes subjects not treated in the rule, those subjects may be eliminated from the title.

Item	*Title*
100	Governing Publications
100 to 119	Definitions
150	Application of Tariff, Schedule
160 to 290	Application of Rates
299	Absorptions
300	Advancing Charges
305	Advertising on Carrier Equipment
310	Advertising or Premiums
315 to 335	Allowances
340	Arbitraries or Differentials
345	Arrival Notice and Undelivered Freight
350	Assembling or Distributing Freight
360	Bills of Lading
370	Bulk Freight
381	Cancellation of Items
382	Cancellation of Looseleaf Pages
390	Capacity Loads
405	Carrier Trade Names
407 to 419	Claims, Loss and Damage
420	Classification of Articles—General
421	Classification by Analogy
422	Classification of Combined Articles
423	Classification of Loose Articles
424	Classification of Parts or Pieces of a Complete Article
426	Classification of Reconditioning Bags
428	Classification of Various Documents Included with Freight
430	COD Shipments
435	Collection of Charges
440	Commercial Zones
455	Consecutive Numbers
460	Consolidation of Shipments
465	Containers
470	Control and Exclusive Use of Vehicles
480	Customs or In-Bond Freight
490	Density

Item	*Title*
500	Detention—Vehicles With Power Units
501	Detention—Vehicles Without Power Units
502	Detention—LTL or AQ Shipments
510	Distances
520	Equipment
535	Expiration Dates
540	Explosives and Other Dangerous Articles
550	Export, Import, Coastwise or Intercoastal Freight
560	Extra Labor
565	Fractions
566	Handling Freight not Adjacent to Vehicle
568	Heavy or Bulky Freight
570	Impracticable Operations
574	Light or Bulky Freight
578	Loading by Consignor—Unloading by Consignee
580	Marking or Tagging Freight
595	Maximum Charge
600	Meat Hooks or Racks
610	Minimum Charge
640	Mixed Shipment—LTL
645	Mixed Shipment—TL or Vol.
647	Notification Prior to Delivery
650	Operating Rights
670	Over Dimension Freight
680 to 689	Packing or Packaging
710	Pallets, Platforms or Skids
720	Payment of Charges
730	Peddler Truck Shipments
740	Permits, Special
750	Pickup or Delivery Service
754	Pickup or Delivery Service—Sundays or Holidays
755	Pickup or Delivery Service—Saturdays
756	Pickup or Delivery Service—Saturday, Sundays, or Holiday
765	Precedence of Rates
766	Precedence of Rules

770	Prepayment
780	Prohibited or Restricted Articles
784	Proof of Delivery
800	Proportional Rates
810	Protective Service
820	Reconsignment or Diversion
830	Redelivery
845	Reference to Tariffs, Schedules
846	Reissued Matter, Method of Treating
848	Released Value
850	Reporting Charge
880	Sealing of Trucks
883	Shipments Tendered as a Truckload
885	Single Shipment Pickup
887	Sorting or Segregating
890	Special Services
900	Stopoffs
910	Storage
920	Substitution of Service
940	Terminal Areas
950	Terminal Charges at Ports
957	Tools
959	Transfer of Lading
960	Transfer of Service
970	Transit Privileges or Services
980	Unnamed Point
985	Vehicle Furnished But Not Used
990	Weighing and Weights
992	Weight Verification
995	Weights—Gross Weights and Dunnage
997	Weights—Minimum Weight Factor

(ii) A Carrier or agent may assign a title and number of its choosing for matter not listed in subparagraph (4)(i), provided the title and number chosen do not conflict with those listed.

(iii) If a title in subparagraph (4)(i) does not properly identify a rule's content, qualifying words, phrases or subtitles may be added. When qualifying words or phrases are used, the prescribed title shall be followed by a dash and the added words, for example: "Bills of Lading—Order Notify." Subtitles or references to excepted classification rules shall follow the title.

(iv) When it is necessary or practicable to split a rule into two or more parts, the prescribed item number may be subdivided. The first part of the rule (which shall contain the general or master rule, if any) must be assigned the prescribed item number without a numerical suffix. Each subdivision must be assigned a compound number, which shall be constructed by use of the prescribed number followed by a hyphen, then a new series of numbers—for example, item 390-1, 390-2, 390-3, et cetera in numerical sequence. Each subdivision must show the prescribed title.

(v) Exceptions to a rule may be included in the general rule or arranged in items immediately following the rule to which exception is taken. In the latter case, exception items are to use the standard item number of the general rule followed by a suffix—for example, exceptions to item 568 would use items 568-1, 568-2, et cetera.

PROPOSED RULES TO GOVERN STANDARD CODES FOR COMMODITY IDENTIFICATION

We propose that 49 CFR 1300, 1304, 1307, 1308 and 1310 be amended by adding to each part the following new sections to be designated respectively as section 1300.34, 130.45, 1307.18, 1308.15, 1308.112 and 1310.36, each to be entitled "STANDARD CODES FOR COMMODITY IDENTIFICATION"

(a) *Definition.* As used in this part, the term "standard transportation commodity code" (STCC) means the standard transportation commodity codes assigned by the Association of American Railroads as contained in tariffs filed with the Commission.

(b) *Use.* Standard transportation commodity codes may be used instead of names to identify commodities in tariffs or schedules. Tariffs or schedules using the codes shall contain, or refer to a tariff publication which contains, the code assignments. Carriers do not need to be shown as participants in the code assignment tariff, and any tariff or schedule may refer to it. The standard transportation commodity codes are the only codes, standing alone, that may be used to identify commodities.

(c) *Listing.* Where the regulations in this part require commodity names to be published in alphabetical order, the standard transportation commodity codes shall be published in numerical order.

PROPOSED RULES TO GOVERN STANDARD CODES FOR POINTS IDENTIFICATION

We propose to amend 49 CFR 1300, 1303, 1304, 1306, 1307, 1308 and 1310 by adding to each part the following new sections to be designated respectively as sections 1300.33, 1303.38, 1304.44, 1306.19, 1307.17, 1308.14, 1308.111 and 1310.35, each to be entitled "STANDARD CODES FOR POINTS IDENTIFICATION."

(a) *Definition.* As used in this part, the term "standard codes for points identification" means the codes assigned to points (places) by the Federal Information Processing Standards Publication 55 (FIPS PUB 55), issued by the National Bureau of Standards, U.S. Department of Commerce, and as contained in tariffs filed with the Commission.

(b) *Use.* Standard codes for points identification may be used in tariffs or schedules to identify points instead of the names of the points. The standard codes for points identification are the only codes, standing alone, that may be used to identify points and places. This does not prohibit the use of other codes when used parenthetically with named points.

(c) *Listing.* If the regulations in this part require the point (place) names to be published in alphabetical order, the

standard codes for point identification shall be published in alphanumerical order—i.e., arranged alphabetically by State code with points within each State sublisted in numerical order.

APPENDIX B

Parties filing comments

Alaska Carriers Association, Inc.
Allied Chemical Corporation
Alltran, Inc.
Alpha Shippers Advisory
The Aluminum Association, Inc.
American Can Company
American Cyanamid Company
American Standard Inc.
The American Tobacco Company
Amoco Chemicals Corporation
Arkansas-Best Freight System, Inc.
Asphalt Roofing Manufacturers Association, Inc.
Associated Motor Carriers' Tariff Bureau, Inc.
Associated Transports, Inc.
Associated Truck Lines, Inc.
Automobile Transporters Tariff Bureau, Inc.
Avedis Zildjian Company
Beaumont Chamber of Commerce
Bethelehem Steel Corporation
The Board of Trade of the City of Chicago
Board of Trade of Kansas City, Missouri, Inc.
Bulk Carrier Conference, Inc.
CW Transport, Inc.
California Manufacturers Association
Central and Southern Motor Freight Tariff Association, Inc.
Central States Motor Freight Bureau, Inc.
Chevron U.S.A. Inc.
Combustion Engineering, Inc.
Commercial Motor Freight, Inc.

Common Carrier Conference-Irregular Route of the
American Trucking Associations, Inc.
Continental Freight Data Systems, Inc.
Corning Glass Works
Crowley Maritime Corporation
Curtis, Inc.
Del Monte Corporation
The Department of Defense
Dow Chemical U.S.A.
E. I. duPont de Nemours and Company
The Eastern Central Motor Carriers Association, Inc.
Emerson Electrical Co.
FMC Corporation
Fieldcrest Mills, Inc.
First Miss Inc.
Fowler & Williams, Inc.
Freight Forwarders Tariff Bureau, Inc.
General American Transportation Corporation
General Mills, Inc.
General Services Administration
Greater Baton Rouge Port Commission
Heavy & Specialized Carriers Tariff Bureau
Heinz, U.S.A.
Holmes Transportation, Inc.
Geo. A. Hormel & Co.
Oscar Mayer & Co.
The Rath Packing Company
Household Goods Carriers' Bureau
Houston Port Bureau, Inc.
Imco Container Company
Interstate Motor Freight System
Iowa Beef Processor, Inc.
Kennecott Minerals Company
Kimberly-Clark Corporation
La Porte Transit Co., Inc.
Maine Rubber International Industrial Tires
The Mason and Dixon Lines, Inc.
The Mead Corporation
Michigan Northern Railway Company

Middle Atlantic Conference
Middlewest Motor Freight Bureau
Minnesota Mining and Manufacturing Company (3M)
Montgomery Ward & Company, Incorporated
Motor Carriers Traffic Association, Inc.
National Association of Freight Transportation Consultants
The National Industrial Traffic League
National Motor Freight Traffic Association, Inc.
National Small Shipments Traffic Conference, Inc.
  Drug and Toilet Preparation Traffic Conference, Inc.
The Nation's Railroads
Nekoosa Papers Inc.
The New England Motor Rate Bureau, Inc.
Niagara Frontier Tariff Bureau, Inc.
North Atlantic Ports Association
The O.K. Trucking Company
Outboard Marine Corporation
Phillips Petroleum Company
The Proctor & Gamble Company
  The Proctor & Gamble Manufacturing Company
  The Proctor & Gamble Distributing Company
  The Proctor & Gamble Paper Products Company
  The Folger Coffee Company
  The Buckeye Cellulose Corporation
  The Hewitt Soap Company
  The D. H. Food Company
  The Traders Oil Mill Company
Rate Comparison Services
Roadway Express, Inc.
Rocky Mountain Motor Tariff Bureau, Inc.
Rubber Manufacturers Association, Inc.
SRI Inc.
Schneider Transport, Inc.
Scott Paper Co.
Sea-Land Service, Inc.
  Sea-Land Freight Service, Inc.
Sonoco Products Company
Southern Hardwood Traffic Association

Southern Motor Carriers Rate Conference
Southern Railway System
Spector Industries, Inc., d/b/a Spector Freight System
Stupp Corporation
Transportation Association of America
Transportation Data Coordinating Committee
USM Corporation
Union Carbide Corporation
United Trucking Service Inc.
McDuffee Motor Freight, Inc.
United Trucking of Kentucky, Inc.
United Trucking Service Inc.
Operator (in part) of
Associated Transport, Inc.
United Trucking Service Inc.
Operator (in part) of
Great Lakes Express Co.
Western Electric Company, Incorporated
Weyerhaeuser Company
Herbert O. Whitten & Associates, Inc.
Yellow Freight System Inc.

APPENDIX C

NOTICE

[CFR Parts 1300, 1303, 1304, 1306, 1307, 1308, 1310]

Ex Parte No. 370

TARIFF IMPROVEMENT

Decided August 14, 1980

AGENCY: Interstate Commerce Commission.

ACTION: Final rules.

SUMMARY: The Commission is adopting new rules which will (1) permit tariffs to express rates and rate changes as percentages; (2) declare rate increases unlawful which result from improperly symbolized tariff changes; (3) prescribe standard titles and item numbers for commonly published tariff rules; and (4) allow tariffs to identify commodities and point locations by certain uniform standard code designations. This action is being taken to improve, simplify and modernize tariffs by reducing their size, complexity and cost; by standardizing their formats; and by promoting greater compatibility with electronic technology.

DATES: Except for sections 1300.33, 1303.38, 1304.44, 1306.19, 1307.17, 1308.14, 1308.111 and 1310.35, which will not become effective until June 30, 1981, the rules adopted in this proceeding are effective 30 days from date of publication of this notice in the Federal Register.

FOR FURTHER INFORMATION CONTACT:

Martin E. Foley
(202) 275-7348

SUPPLEMENTARY INFORMATION:

This proceeding was instituted by a notice of proposed rulemaking, published in the Federal Register on October 18, 1979 (44 F.R. 60122), to consider our proposals for tariff improvement. In response to the invitation in our notice, more than 100 comments were received, representing all segments of the surface transportation community: carriers and carrier organizations, shippers and shipper associations, traffic consultants, civic organizations, port authorities and Federal agencies.

The proposed regulations, as revised and adopted after analysis and evaluation of the comments, are designed not only to improve, simplify and modernize tariffs, but to ensure consumer protections in the face of Commission budgetary and personnel constraints and to afford carriers the tariff flexibility they will need to effectively compete in what we foresee as a

substantially less-regulated environment in the future. Specifically, the adopted rules will:

(1) permit carriers to express rates as percentages and to file "percentage supplements" to reflect general increases or reductions in their rates;

(2) declare rate increases unlawful and not collectible which result from improperly symbolized tariff changes;

(3) prescribe standard titles and item numbers for commonly published tariff rules; and

(4) allow tariffs to identify commodities and point locations by uniform standard code designations. (NOTE: The rules adopted to govern the identification of point locations (section 1300.33, 1303.38, 1304.44, 1306.19, 1307.17, 1308.14, 1308.111 and 1310.35) will not become effective until June 30, 1981.)

The Commission is also directing its staff to conduct further study in connection with additional recommendations for tariff improvements that were suggested by the commenters.

Complete copies of the decision in this proceeding can be obtained from the Office of the Secretary, Interstate Commerce Commission, Washington, DC, 20423.

Accordingly, Chapter X of Title 49 of the Code of Federal Regulations is amended as follows:

1. By revising section 1300.4(i)(1) to read as follows:

§ 1300.4 CONTENTS OF TARIFFS

Tariffs shall contain, in the order named:

* * * * * * *

(i) *Rates.* (1) A statement of the rates and the places from, to, and between which they apply, arranged in a simple and systematic manner. At least one of the rates shall be explicitly stated (per 100 pounds, ton, car or other unit) in dollars and cents in lawful money of the United States. Other rates in the tariff may be expressed as percentages of the

stated rates, provided that the tariff clearly explains how to compute the other rates, including how to dispose of fractions. A rate may not be expressed as a fraction or multiple of another rate or as a percentage of another rate which is itself expressed as a percentage.

2. By adding section 1300.9(n) to read as follows:

§ 1300.9 AMENDMENTS AND SUPPLEMENTS

* * * * * * *

(n) *Percentage supplements to provide general rate changes.* (1) A supplement, which expresses the amount of change as a percentage by which the tariff's explicitly stated rates and charges are to be increased or reduced, may be filed to any tariff to provide a general change in the level of all or substantially all rates and charges, or all or substantially all the rates and charges in a specific category in the tariff.

(2) The supplement shall clearly explain its application and shall state where any exceptions to its application are listed. It shall also show how to compute the increased or reduced rates from the percentages shown; how to dispose of fractions; and how to compute multiple-factor rates made by the use of arbitraries or other means. Only matter concerning the percentage change may be published in the supplement.

(3) A percentage supplement shall bear an expiration date on its title page which shall be within 2 years of its effective date. The title page shall also describe the nature of the changes effected by the supplement. Only 1 percentage supplement may be in effect at one time.

(4) Percentage supplements may change tariff matter which will not have been in effect for 30 days. Subsequent amendments filed prior to the effective date of the percentage supplement may change or cancel, on lawful notice, matter changed by the percentage supplement before that change has been in effect for 30 days. Tariff amendments containing explicitly stated rates or charges becoming effective during the effectiveness of a percentage supplement shall state whether

or not they are subject to the provisions of the percentage supplement.

3. By deleting the first two sentences and the first word of the third sentence of section 1310.7(a)(2), and replacing them with the following:

§ 1310.7 STATEMENT OF RATES (RULE 7)

(a) *Rates must be clear and explicit.*

(1) * * *

(2) The rates and the places from, to, and between which they apply be arranged in a simple and systematic manner. At least one of the rates shall be explicitly stated in dollars and cents in lawful money of the United States. Other rates in the tariff may be expressed as percentages of the stated rates provided the tariff clearly explains how to compute the other rates and how to dispose of fractions. A rate may not be expressed as a fraction or multiple of another rate or as a percentage of a rate which is itself expressed as a percentage. All explicitly stated rates * * *

* * * * * * * *

4. By deleting section 1310.7(c) which now prohibits the express of class rates as percentages, fractions or multiples of another rate.

5. By adding section 1310.10(k) to read as follows:

§ 1310.10 AMENDMENTS (RULE 10)

* * * * * * * *

(k) *Percentage supplements to provide general rate changes.* (1) A supplement which expresses the amount of change as a percentage by which the tariff's explicitly stated rates and charges are to be increased or reduced may be filed to any tariff to provide a general change in the level of all or substantially all the rates and charges, or all or substantially all the rates and charges in a described category in the tariff.

(2) The supplement shall clearly explain its application and shall state where any exceptions to its application are listed. It shall also show how to compute the increased or reduced rates from the percentages shown; how to dispose of fractions; and how to compute multiple-factor rates made by the use of arbitraries or other means. Only matter concerning the percentage change may be published in the supplement.

(3) A percentage supplement shall bear an expiration date on its title page which shall bear an expiration date on its title page which shall be within 2 years of its effective date. The title page shall also describe the nature of the changes effected by the supplement. Only 1 percentage supplement may be in effect at one time.

(4) Percentage supplements may change tariff matter which will not have been in effect for 30 days. Subsequent amendments filed prior to the effective date of the percentage supplement may change or cancel, on lawful notice, matter changed by the percentage supplement before that change has been in effect for 30 days. Tariff amendments containing explicitly stated rates or charges becoming effective during the effectiveness of a percentage supplement shall state whether or not they are subject to the provisions of the percentage supplement.

6. By adding the following new paragraph to be designated, respectively, as section 1300.2(a)(4), section 1303.4(d)(3), section 1304.2(c), section 1306.5(b)(2), section 1307.5(r)(1), section 1308.2(a) and section 1310.10(f)(5):

Changes resulting in increases which are not identified by proper symbols shall be considered unlawfully published and filed and therefore invalid and not collectable. In such cases, the lawful provisions will be those which were purportedly superseded. Invalid provisions shall be canceled by publications which shall bring forward, or properly amend, provisions which have remained in effect by reason of invalid publication.

7. By revising section 1300.4(h)(2) to read as follows:

§ 1300.4 CONTENT OF TARIFFS

* * * * * * * *

(h) *Rules governing the tariffs.*

(1) * * *

(2)(i) Each rule or regulation shall be given a separate number. Where the following subjects are to be provided for in tariffs, the rules covering them shall bear the titles indicated and be assigned the item numbers indicated. If a title includes subjects not treated in the rule, those subjects may be eliminated from the title.

Item	*Title*
5	Description of Governing Classifications, Exceptions and Rules Tariffs
10	Station List and Conditions
15	Explosives, Dangerous Articles
20	Reference to Tariffs, Items, Notes, Rules, etc.
25	Terminal or Transit Privileges or Services
30	Perishable Freight
35	Transfer Between Connecting Carriers
40	Consecutive Numbers
45	Capacities and Dimension of Cars
50	Combination Rates
55	Substitution of Motor Service for Rail or Water Service
60	National Service Order Tariff
65	Proportional Rates—application
70	Alternation*
75	Method of Canceling Items
80	Intermediate Application—origin
85	Intermediate Application—destination
90	Fourth Section Authorities
100	Method of Denoting Reissued Matter in Supplements
105	Straight or Mixed CL Application

(ii) A carrier or agent may assign a title and number of its choosing for matter not listed in subparagraph 2(i), provided the title and number chosen do not conflict with those listed.

(iii) If a title in subparagraph 2(i) does not properly identify a rule's content, qualifying words, phrases or subtitles may be added. When qualifying words or phrases are used, the prescribed title shall be followed by a dash and the added words, for example: "Alternation—C. L. Rates—Varying Minimum Weights." Subtitles or references to excepted classification rules shall follow the title.

(iv) When it is necessary or practicable to split a rule into two or more parts, the prescribed item number may be subdivided. The first part of the rule (which shall contain the general or master rule, if any) must be assigned the prescribed item number without a numerical suffix. Each subdivision shall be assigned a compound number, which shall be constructed by use of the prescribed number followed by a decimal, or a hyphen then a new series of numbers, for example: item 70.1, 70.2, 70.3, etc., or 70-1, 70-2, 70-3, et cetera, in numerical sequence. Each subdivision must show the prescribed title.

(v) Exceptions to a rule may be included in the general rule or arranged in items immediately following the rule to which exception is taken. In the latter case, exception items are to use the standard item number of the general rule followed by a suffix—for example, exceptions to item 85 would use items 85.1, 85.2, et cetera, or 85-1, 85-2, et cetera.

(vi) Tariffs subject to the provisions contained in section 1300.67 are not subject to the requirements of this subparagraph.

8. By revising section 1307.5(1) to read as follows:

§ 1307.5 FORM AND CONTENT OF SCHEDULES

* * * * * * *

(1) *Rules.* (1) Rules and other provisions affecting rates and charges shall be published following the index of points. Each rule or regulation shall be given a separate item number. Where the subjects shown in section 1310.4(h)(4)(i) of this chapter are to be provided for in schedules, the rules covering them shall bear the titles and be assigned the item numbers listed in section 1310.4(h)(4)(i) of this chapter.

(2) A carrier may assign a title and number of its choosing for matter not listed in section 1310.4(h)(4)(i) of this chapter, provided the title and number chosen do not conflict with those listed.

(3) If a title listed in section 1310.4(h)(4)(i) of this chapter does not properly identify a rule's content, qualifying words, phrases or subtitles may be added. When qualifying words are used, the prescribed title shall be followed by a dash and the added words, for example: "Bills of Lading—Order Notify." Subtitles or references to excepted classification rules shall follow the title.

(4) When it is necessary or practicable to split a rule into two or more parts, the prescribed item number may be subdivided. The first part of the rule (which shall contain the general or master rule, if any) must be assigned the prescribed item number without a numerical suffix. Each subdivision must be assigned a compound number, which shall be constructed by use of the prescribed number followed by a decimal or a hyphen, then a new series of numbers—for example, items 390.1, 390.2, 390.3, et cetera, or 390-1, 390-2, 390-3, et cetera, in numerical sequence. Each subdivision must show the prescribed title.

(5) Exceptions to a rule may be included in the general rule or arranged in items immediately following the rule to which exception is taken. In the latter case, exception items are to use the standard item number of the general rule followed by a suffix—for example, exceptions to item 510 would use items 510.1, 510.2, et cetera, or 510-1, 510-2, et cetera.

* * * * * * *

9. By adding the following sentence at the end of section 1309.1: "Rules contained in tariffs shall be numbered and titled using the system prescribed either in section 1300.4(h)(2)(i) of this chapter or in section 1310.4(h)(4)(i) of this chapter."

10. By adding the following subparagraph (4) to section 1310.4(h):

§ 1310.4 FORM, SIZE, AND PRINTING (RULE 4)

* * * * * * *

(h) * * *

(4)(i) Each rule or regulation shall be given a separate number. Where the following subjects are to be provided for in tariffs, the rules covering them shall bear the titles indicated and be assigned the item numbers indicated. If a title includes subjects not treated in the rule, those subjects may be eliminated from the title.

Item	*Title*
100	Governing Publications
110 to 119	Definitions
150	Application of Tariff, Schedule
160 to 290	Application of Rates
299	Absorptions
300	Advancing Charges
305	Advertising on Carrier Equipment
310	Advertising or Premiums
315 to 335	Allowances
340	Arbitraries or Differentials
345	Arrival Notice and Undelivered Freight
350	Assembling or Distributing Freight
360	Bills of Lading
370	Bulk Freight
381	Cancellation of Items
382	Canceling Original and Revised Pages, Except the Title Page
390	Capacity Loads

405 Carrier Trade Names
407 to 419 Claims, Loss and Damage
420 Classification of Articles—General
421 Classification by Analogy
422 Classification of Combined Articles
423 Classification of Loose Articles
424 Classification of Parts or Pieces of a Complete Article
426 Classification of Reconditioning Bags
428 Classification of Various Documents Included with Freight
430 COD Shipments
435 Collection of Charges
440 Commercial Zones
455 Consecutive Numbers
460 Consolidation of Shipments
465 Containers
470 Control and Exclusive Use of Vehicles
480 Customs or In-Bond Freight
490 Density
500 Detention—Vehicles With Power Units
501 Detention—Vehicles Without Power Units
502 Detention—LTL or AQ Shipments
503 Detention—Prearranged Scheduling
510 Distances
520 Equipment
530 Expedited Service
535 Expiration Dates
540 Explosives and Other Dangerous Articles
550 Export, Import, Coastwise or Intercoastal Freight
560 Extra Labor
565 Fractions
566 Handling Freight Not Adjacent to Vehicle
568 Heavy or Bulky Freight
570 Impracticable Operations
575 Light or Bulky Freight
578 Loading by Consignor—Unloading by Consignee

580 Marking or Tagging Freight
595 Maximum Charge
600 Meat Hooks or Racks
610 Minimum Charge
640 Mixed Shipment—LTL
645 Mixed Shipment—TL or Vol.
647 Notification Prior to Delivery
650 Operating Rights
660 Order—Notify Shipments
670 Over Dimension Freight
675 Over Weight Shipments
680 to 689 Packing or Packaging
710 Pallets, Platforms or Skids
720 Payment of Charges
730 Peddler Truck Shipments
740 Permits, Special
750 Pickup or Delivery Service
753 Pickup or Delivery Service—Private Residence
754 Pickup or Delivery Service—Sundays or Holidays
755 Pickup or Delivery Service—Saturdays
756 Pickup or Delivery Service—Saturdays, Sundays or Holidays
765 Precedence of Rates
766 Precedence of Rules
770 Prepayment
780 Prohibited or Restricted Articles
784 Proof of Delivery
800 Proportional Rates
810 Protective Service
820 Reconsignment or Diversion
830 Redelivery
845 Reference to Tariffs, Schedules
846 Reissued Matter, Method of Treating
848 Released Value
850 Reporting Charge
860 Returned, Undelivered Shipments

880 Sealing of Trucks
881 Section 10721 Tenders
883 Shipments Tendered as a Truckload
885 Single Shipment Pickup
887 Sorting or Segregating
890 Special Services
900 Stopoffs
910 Storage
920 Substitution of Service
940 Terminal Areas
950 Terminal Charges at Ports
957 Tolls
959 Transfer of Lading
960 Transfer of Service
970 Transit Privileges or Services
980 Unnamed Points
985 Vehicle Furnished But Not Used
990 Weighing and Weights
992 Weight Verification
995 Weights—Gross Weights and Dunnage
997 Weights—Minimum Weight Factor

(ii) A carrier or agent may assign a title and number of its choosing for matter not listed in subparagraph (4)(i), provided the title and number chosen do not conflict with those listed.

(iii) If a title in subparagraph (4)(i) does not properly identify a rule's content, qualifying words, phrases or subtitles may be added. When qualifying words or phrases are used, the prescribed title shall be followed by a dash and the added words, for example: "Bills of Lading—Order Notify." Subtitles or references to excepted classification rules shall follow the title.

(iv) When it is necessary or practicable to split a rule into two or more parts, the prescribed item number may be subdivided. The first part of the rule (which shall contain the general or master rule, if any) must be assigned the prescribed

item number without a numerical suffix. Each subdivision must be assigned a compound number, which shall be constructed by use of the prescribed number followed by a decimal or hyphen, then a new series of numbers—for example, items 390.1, 390.2, 390.3, et cetera, or items 390-1, 390-2, 390-3, et cetera, in numerical sequence. Each subdivision must show the prescribed title.

(v) Exceptions to a rule may be included in the general rule or arranged in items immediately following the rule to which exception is taken. In the latter case, exception items are to use the standard item number of the general rule followed by a suffix—for example, exceptions to item 568 would use items 568.1, 568.2, et cetera, or 568.1, 568.2, et cetera.

(vi) Tariffs subject to the provisions contained in sections 1310.33 are not subject to the requirements of this subparagraph.

11. By adding the following new sections to be designated respectively as section 1300.34, 1304.45, 1307.18, 1308.15, 1308.112 and 1310.36, each to be entitled "STANDARD CODES FOR COMMODITY IDENTIFICATION."

(a) *Definition.* As used in this part, the term "standard transportation commodity code: (STCC) means the standard transportation commodity codes assigned by the Association of American Railroads as contained in tariffs filed with the Commission.

(b) *Use.* Standard transportation commodity codes may be used instead of, or in addition to, the naming of commodities in tariffs or schedules. In the event that a tariff code description would be at variance with its accompanying named-commodity description, the presumption is that the named-commodity description is accurate, and that the code description is inaccurate. This presumption may be rebutted by a showing of clear evidence of the commodity actually transported. Tariffs or schedules using the codes shall contain, or refer to a tariff publication which contains, the code assignments. Carriers do

not need to be shown as participants in the code assignment tariff, and any tariff or schedule may refer to it. The standard transportation commodity codes are the only codes, standing alone, that may be used to identify commodities.

(c) *Listing.* When commodity codes are used in lieu of named commodities, and where the regulations in this part require commodity names to be published in alphabetical order, the standard transportation commodity codes shall be published in numerical order.

12. By adding the following new sections to be designated respectively as section 1300.33, 1303.38, 1304.44, 1306.19, 1307.17, 1308.14, 1308.111 and 1310.35, each to be entitled "STANDARD CODES FOR POINTS IDENTIFICATION."

(a) *Definition.* As used in this part, the term "standard codes for points identification" means the codes assigned to points (places) by the Federal Information Processing Standards Publication 55 (FIPS PUB 55), issued by the National Bureau of Standards, U.S. Department of Commerce, and as contained in tariffs filed with the Commission.

(b) *Use.* Standard codes for points identification may be used instead of, or in addition to, the naming of points in tariffs or schedules. The standard codes for points identification are the only codes, standing alone, that may be used to identify points and places.

(c) *Listing.* When standard codes for points identification are used in lieu of named points, and if the regulations in this part require the point (place) names to be published in alphabetical order, the standard codes for point identification shall be published in alphanumerical order—i.e., arranged alphabetically by State code with points within each State sublisted in numberical order.

The rules adopted in this proceeding are promulgated under authority contained in section 553 of the Administrative Procedure Act (5 U.S.C. 553) and section 10762 of the Interstate Commerce Act (49 U.S.C. 10762).

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

VICE CHAIRMAN GRESHAM, dissenting in part:

Adoption of the FIPS PUB 55 are the standard permissible points code for tariffs is premised on its anticipated widespread future use and adaptation to the needs of transportation. However, the SPLC has been proven its worth and flexibility. While the FIPS PUB 55 might require costly conversion for users and future adjustments in the code itself, the adoption of the SPLC as the standard permissible points code would create no such problems. The FIPS PUB 55 can always be used parenthetically with named points. If it becomes more prevalent in transportation uses in the future, its adoption as the standard code can be subsequently examined without the variables which seriously question the value of mandating its use at this time.

COMMISSIONER STAFFORD, dissenting in part:

Commissioner Stafford dissented in part I of the report because he did not believe that section 10762(a)(2) of the Interstate Commerce Act permits the Commission to allow carriers to express rates as percentages of an initial filing.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, Alexis, and Gilliam. Vice Chairman Gresham dissenting in part with a separate expression. Commissioner Stafford dissenting in part with a separate expression.

AGATHA L. MERGENOVICH,
Secretary.

(SEAL)

APPENDIX D

INTERSTATE COMMERCE COMMISSION

Ex Parte No. 370

TARIFF IMPROVEMENT

Decided June 10, 1981

Upon reconsideration, the standard point location code rules adopted in our August 14, 1980 decision are revised to allow carriers maximum flexibility in code selection.

DECISION

BY THE COMMISSION:

This rulemaking proceeding was initiated on our own motion to improve, simplify and modernize tariffs. In our decision of August 14, 1980, which was served September 8, 1980, and published in the Federal Register September 12, 1980 (45 F.R. 60438), we adopted rules which:

(1) permitted tariffs to express rates and rate changes as percentages;

(2) declared rate increases unlawful which result from improperly symbolized tariff changes;

(3) prescribed standard titles and item numbers for common published tariff rules; and

(4) allowed tariffs to identify commodities and point locations by uniform standard code designations.

Except for the rules allowing the use of a standard point location code (FIPS PUB 55), the scheduled effective date for these regulations was October 14, 1980. The FIPS PUB 55 rules were scheduled to become effective June 30, 1981.

However, in response to a petition filed on behalf of the Nation's railroads, the Commission, in a decision served Octo-

ber 17, 1980, stayed both the symbolization and the FIPS PUB 55 rules pending judicial review. The railroads have now filed a petition for modification of that stay insofar as the FIPS PUB 55 rules are concerned. This petition, filed on October 24, 1980, states that they had originally planned to ask for judicial review of both issues; however, they subsequently changed their position, and when they filed their petition for review and stay with the United States Court of Appeals for the Fifth Circuit, only the symbolization issue was presented for judicial review. (The FIPS PUB 55 issue was already before the Commission by virtue of a petition filed by the railroads September 29, 1980, asking for reopening of the proceeding.) The court of appeals granted the requested stay of the symbolization rules on October 13, 1980.

Accordingly, the railroads now suggest that the Commission's stay of the FIPS PUB 55 rules be modified so that its time period will end with our disposition of their petition to reopen. In a reply to the railroad's petition dated March 12, 1981, the National Motor Freight Traffic Association (NMFTA), who is also seeking judicial review of our decision, requests that the stay not be so modified. In view of the court's stay of the symbolization rules and the recision (discussed later in this decision) of our adoption of FIPS PUB 55 as the only stand-alone code for identification of places, there is no longer any reason for us to continue our stay. Rather than granting the railroad's petition for modification, however, we are vacating in its entirety our stay order served October 17, 1980.

PETITIONS FOR REOPENING AND RECONSIDERATION

We have received a total of 19 petitions to reopen or reconsider our August 14, 1980 decision.[1] The issues raised in these petitions will be discussed in the same order and within the same framework that they were discussed in that decision.

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[1] Petitioners are listed in the appendix.

PARTE I.—Percentage Expression Of Rates, Charges, And Amounts Of Increase Or Reduction

A petition filed jointly by National Small Shipments Traffic Conference, Inc. and Drug and Toilet preparation Traffic Conference, Inc. (the Conferences) requests that the proceeding be reopened for the purpose of reconsidering the lawfulness and desirability of allowing carriers to publish rates that are expressed as percentages of explicitly stated rates. This issue is not raised by any of the other 18 petitioners.

The Conferences contend that the decision materially erred in (1) its assertion that the Commission has jurisdiction to void the statutory requirement that all motor carrier rates be stated in terms of lawful money of the United States, and (2) its conclusion that permitting carriers to publish rates in terms of percentages will reduce costs and encourage flexibility.

In our August 14, 1980 decision we concluded that the initial publication of a rate, or rates, in cents (or dollars and cents) satisfied the statutory requirement. Under the rules adopted in that decision, a percentage rate may only be expressed as a percentage of an explicitly stated rate (i.e., one that is stated in cents or in dollars and cents). It may *not* be expressed as a percentage of another percentage; nor may it be expressed as a percentage of weight, or as a percentage of a rate stated in anything *other* than lawful money of the United States. Clearly, then, a rate expressed as a percentage of a rate which is expressed in cents (or dollars and cents) is, for all practical and commercial purposes, stated "in terms" of lawful money of the United States.

To support its contention that the Commission erred in its conclusion that percentage rate expression would help reduce costs, the Conferences argue that cost reductions will accrue only, if at all, to carriers. Shippers, they contend, will face increased costs resulting from the need to make multiple calculations to arrive at a correct rate, and that the errors resulting from those calculations will not only create additional costs (for both carriers and shippers) but will cause customer

dissatisfaction, as well. No evidence is offered in support of this contention, and our experience so far with the adopted rules indicates that, indeed, there is none. To the contrary, the rules have been in effect since October 14, 1980; they have been utilized extensively in the intervening months by carriers filing tariffs both individually and collectively; and we have not received even one complaint from shippers or carriers. We can only conclude that our prior decision was not in error on this issue.

Similarly, our experience with the adopted rules gives every indication that their utilization has enhanced and will continue to enhance, tariff flexibility. In many instances, utilization of percentage expression has enabled carriers to replace dozens of pages of explicitly stated rates with a single tariff item. This has not only reduced costs (for both carriers and shippers), but has also allowed carriers to respond quickly and easily to changing market conditions.

PARTE II.—Symbolization Of Tariff Matter Resulting In Increases

In part II of our notice of final rules we adopted regulations which stipulate that increases resulting from tariff changes not properly symbolized are unlawful and therefore invalid and not collectible. The effective date of these regulations has been stayed by the court, and proceedings on this issue are presently pending before the United States Court of Appeals for the Fifth Circuit in No. 80-2327, *National Motor Freight Traffic Association, Inc.* v. *United States and Interstate Commerce Commission*, and No. 80-2099, *Aberdeen and Rockfish Railroad Company and Other Railroads* v. *United States and Interstate Commerce Commission*. Court action has been held in abeyance pending our disposition of the petitions to reopen this proceeding for reconsideration. After reviewing the petitions, however, we conclude that no new material has been offered which would tend to alter our finding that a need exists for the regulations adopted in part II of our August 14, 1980 decision, and that their adoption was proper.

PARTE III.—Standard Titles And Item Numbers For Commonly Published Tariff Rules

A petition filed on behalf of the Nation's railroads (the railroads) suggests that the title and item numbering system developed by the Joint Railroad Tariff Computerization Committee (JRTCC) be adopted in lieu of the numbering system we adopted in this part of our August 14, 1980 decision. The petition contends that the JRTCC system is more current and advanced than that of the Railroads Tariff Research Group, which we codified in this proceeding.

As the railroads recognize, any proposal to adopt the JRTCC system would require public notice and comment. However, we have not been furnished with specific information about the JRTCC system, which information would be needed for inclusion in any notice to the public. In order for adequate consideration to be given to the adoption of this system, it would be necessary for the railroads (or any other interested party) to supply us with the appropriate details. Pending receipt of this information and a subsequent deliberation on any new rulemaking which might be instituted, we will maintain the standard title and item numbering rules adopted for the railroads' use in our prior decision.

Since compliance with these rules is not mandatory until October 14, 1985, this will impose no hardship on rail tariff makers.

PARTE IV.—Standard Tariff Codes For Commodity And Points Identification

Subpart (A): *Standard tariff codes for commodity identification.*—The NMFTA and the Rocky Mountain Motor Tariff Bureau, Inc. (RMB) seek reconsideration of our adoption of the Standard Transportation Commodity Code (STCC) as the only permissible stand-alone code for commodity identification.

Their petitions, however, raise no issues not previously considered by the Commission in its decision of August 14,

1980. Essentially, petitioners contend that STCC is fatally flawed as a proper code because it is not suitable for motor carrier pricing purposes, and that no remedy for that flaw will be available in the foreseeable future. NMFTA also contends that its own product, the National Motor Freight Classification (the Classification), does meet those pricing needs.

In response, we will first point out that our adoption of STCC does nothing to interfere with the choice of motor carriers to continue to use the Classification to identify commodities in their tariffs. The carriers remain free not to use STCC if they so choose. On the other hand, those carriers who find STCC acceptable—even if not acceptable in every case—can employ that code as a commodity identifier in stand-alone fashion. In consideration of their own pricing needs as well as the needs of their shippers, carriers are even free to use STCC and the Classification in the same tariff. In light of this flexibility, the NMFTA petition is not persuasive. It would thwart adoption of a permissive all-modal standard code for commodity descriptions simply because the current structure of that code is not always suitable for all motor carrier pricing needs. This parochial view ignores the fact that all motor carriers retain full freedom to select the most appropriate method of tariff commodity identification.

Subpart (B): *Standard tariff codes for points identification.*—A total of 18 petitions seek reopening or reconsideration of Commission adoption of FIPS PUB 55 as the only permissible stand-alone code for identification of places (points). The railroads contend that FIPS PUB 55 should not prevail as an adopted code because: (1) it is not structured to reflect geographical relationships; (2) it is not compatible with other place codes now in use; and (3) the cost of displacing other codes in favor of FIPS will be prohibitive. The NMFTA petition, joined by RMB, echoes the basic three-point thrust of the rail petition and adds two further contentions: (1) that the Commission failed properly to weigh the effect of adoption of FIPS on the quality of the human environment or the conservation of energy resources, and (2) that adoption of

FIPS might foster credit discrimination. The remaining 15 petitions (which were filed in letter form) deal primarily with the projected "retooling" costs of converting from the Standard Point Location Code (SPLC) to FIPS PUB 55.

We are persuaded to reverse our earlier adoption of FIPS PUB 55 as the only permissible stand-alone code for identification of points. Instead, we will permit the tariff use of any place code in stand-alone fashion, provided that an explanation of the chosen code (showing the code together with the name of the point represented by the code) is made available to the tariff user in the same tariff (or in a separate tariff specifically named as a governing publication) utilizing the code.

We see no merit in NMFTA's argument that FIPS PUB 55 will contribute to "redlining" practices—i.e., that certain code-identified communities might be subjected to unfair credit arrangements by the carriers. The FIPS code is no more susceptible to this kind of abuse than is any other code including NMFTA's own code, the SPLC. Moreover, this Commission stands ready to address any challenge of unfair credit practices when presented on the formal docket.

Neither has NMFTA presented any persuasive arguments in its challenge that our earlier decision failed to weigh properly environmental considerations. The use of place codes in lieu of naming points in tariffs is a liberalization of former regulations. We fail to see how any relaxation of tariff format regulations can have an adverse impact on the human environment.

Thus, the decision to reverse our earlier position is grounded on the numerous statements received of the extremely high costs of converting from existing code systems to the FIPS PUB 55 system. Although we are somewhat concerned that an "any code" system might undermine the universal intelligibility of the tariff library, we defer to the economic concerns which would attend adoption of a uniform stand-alone place code.

This decision is not a major Federal action significantly affecting the quality of the human environment or conservation of energy resources.

It is ordered:

1. Our stay order served October 17, 1980 in the proceeding is vacated, and the petition for modification of that order is denied.

2. Chapter X of title 49 of the Code of Federal Regulations is amended by revising sections 1300.33, 1303.38, 1304.44, 1306.19, 1307.17, 1308.14, 1308.111, and 1310.35 to read as follows:

CODES FOR IDENTIFICATION OF PLACES

§

(a) *Definition.* As used in this part, the term "code for identification of places" means any numeric or alphabetic system used to represent, or identify, places, points, facilities, or locations.

(b) *Use.* Code for identification of places may be used instead of, or in addition to, the naming of places, points, facilities, or locations; provided that an explanation of the code (showing code together with the name of the place, point, facility, or location represented by the code) is contained in the same tariff utilizing the code, or in a separate tariff specifically named as a governing publication.

(c) *Listing.* When codes for identification of places are used in lieu of named places, and if the regulations in this part require the place names to be published in alphabetical order, the codes for identification of places shall be published in numerical order (if a numeric code) or in alphabetical order (if an alphabetic code).

3. In all other respects, the petitions for reopening and reconsideration of our August 14, 1980 decision in this proceeding are denied.

By the Commission, Acting Chairman Alexis, Commissioners Gresham, Clapp, Trantum, and Gilliam.

AGATHA L. MERGENOVICH,
(SEAL) *Secretary.*

APPENDIX

List of petitioners

Associated Truck Lines, Inc.
Attorneys for the Nation's Railroads
Bethlehem Steel Corporation
Borg Warner Corporation
Brockway Glass Company, Inc.
Deering Milliken, Inc.
Diamond Shamrock Corporation
Drug and Toilet Preparation Traffic Conference, Inc. and National Small Shipments Traffic Conference, Inc. (a joint petition)
East Texas Motor Freight
Farmland Industries, Inc.
Fisher & Brothers, Inc.
The Goodyear Tire & Rubber Company
Inland Container Corporation
National Motor Freight Traffic Association, Inc.
Oscar Mayer & Co.
Republic Steel Corporation
Rocky Mountain Motor Tariff Bureau, Inc.
Supervisor of Shipbuilding, Conversion and Repair, U.S. Navy Western Electric

NOTICE

Ex Parte No. 370

TARIFF IMPROVEMENT
(49 CFR PARTS 1300, 1303, 1304, 1306, 1307, 1308, 1310)

Decided June 10, 1981

AGENCY: Interstate Commerce Commission.

ACTION: Final rules.

SUMMARY: In September 1980, the Commission published rules designed to improve, simplify and modernize tariffs. On October 17, 1980, the Commission stayed the effective date of two aspects of rules, but upon reconsideration, is now revising and making effective one set of those rules. In these final rules, the standard point location code rules are revised to allow carriers maximum flexibility in selecting tariff codes used to identify places.

DATES: The revised rules become effective (on date of publication of this notice in the Federal Register).

FOR FURTHER INFORMATION CONTACT:

Martin E. Foley
(202) 275-7348

SUPPLEMENTARY INFORMATION:

In our decision of August 14, 1980, served September 8, 1980, and published in the Federal Register of September 12, 1980, (45 F.R. 60438) we adopted rules designed to improve, simplify and modernize tariffs (clarified and corrected at 45 F.R. 75667, November 17, 1980). As pertinent here, one set of rules established a standard code (FIPS PUB 55) as the only permissible tariff place code to be used in stand-alone fashion.

The effective date of such rules was originally set for June 30, 1981. Subsequently, by our order of October 17, 1980, the effectiveness of certain rules was stayed pending judicial review. We are now modifying that stay order to exclude the FIPS PUB 55 rules.

We received 19 petitions for reopening and reconsideration of certain aspects of the rules adopted by our decision of August 14, 1980. We have considered these petitions and are persuaded that our adoption of FIPS PUB 55 was inappropriate because it did not give adequate consideration to the prohibitive costs involved in converting to the FIPS system from other existing code systems. Therefore, we are adopting more liberal rules which do not prescribe a uniform tariff code for identification of places in stand-alone fashion; rather, we will permit any code to serve this purpose so long as the tariff user is supplied with an explanation of the chosen code.

We have also considered the petitions requesting reconsideration of other aspects of our decision of August 14, 1980. We are not persuaded to revise our earlier decision in those matters. The petitions are denied except with regard to the FIPS code.

Complete copies of the decision in this proceeding can be obtained from the Office of the Secretary, Interstate Commerce Commission, Washington, DC 20423.

Chapter X of Title 49 of the Code of Federal Regulations is amended by revising sections 1300.33, 1303.38, 1304.44, 1306.19, 1307.17, 1308.14, 1308.111, and 1310.35 to read as follows:

CODES FOR IDENTIFICATION OF PLACES

§

(a) *Definition.* As used in this part, the term "code for identification of places" means any numeric or alphabetic system used to represent, or identify, places, points, facilities, or locations.

(b) *Use.* Code for identification of places may be used instead of, or in addition to, the naming of places, points, facilities, or locations; provided that an explanation of the code (showing code together with the name of the place, point, facility, or location represented by the code) is contained in the same tariff utilizing the code or in a separate tariff specifically named as a governing publication.

(c) *Listing.* When codes for identification of places are used in lieu of named places, and if the regulations in this part require the place names to be published in alphabetical order, the codes for identification of places shall be published in numerical order (if a numeric code) or in alphabetical order (if an alphabetic code).

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

(49 U.S.C. 10762, 5 U.S.C. 553.)

By the Commission, Acting Chairman Alexis, Commissioners Gresham, Clapp, Trantum, and Gilliam.

AGATHA L. MERGENOVICH,
Secretary.

(SEAL)

APPENDIX E

49 CFR PARTS 1300, 1303, 1304, 1306, 1307, 1308, 1309, 1310, AND 1312

[Ex Parte No. 370]

TARIFF IMPROVEMENT

AGENCY: Interstate Commerce Commission

Action: Notice of Proposed Rulemaking

SUMMARY: the Commission proposes to adopt new rules designed to improve, simplify and modernize tariffs by reducing their size, complexity and cost; by standardizing their formats; and by promoting greater compatibility with electronic technology. Specifically, the proposed rules would:

(1) Permit tariffs to express rates and amounts of increase or reduction as percentages;

(2) Declare rate increases unlawful which result from improperly symbolized tariff changes;

(3) Prescribe standard titles and item numbers for commonly-published tariff rules; and

(4) Allow tariffs to identify commodities and points locations by uniform standard code designations.

DATES: Interested persons may submit written comments on the proposed rules on or before December 17, 1979.

ADDRESS: Send comments and 10 copies if possible, to: Room 5356, Interstate Commerce Commission, Washington, DC 20423.

FOR FURTHER INFORMATION CONTACT:

Martin E. Foley. (202) 275-7348

SUPPLEMENTARY INFORMATION: The Commission proposes to adopt new rules designed to improve, simplify and modernize the tariffs published and filed by carriers subject to its jurisdiction. The objectives of these rules are to reduce the size, complexity and cost of tariffs, to standardize their formats, and to promote greater compatibility with electronic computer technology.

For convenience, the supplementary information offered in connection with the proposed rules is divided into four parts, with Part IV containing two subparts. Parties wishing to comment on the proposed rules are asked to separate and clearly identify, by number and title, the parts or subparts to which their comments are directed.

PART I — PERCENTAGE EXPRESSION OF RATES, CHARGES AND AMOUNTS OF INCREASE OR REDUCTION

(See Appendix A for proposed rules)

The rules proposed in Appendix A are designed to reduce the size, complexity and cost of tariffs by allowing railroads, freight forwarders and motor common carriers to express their rates, charges and amounts of change as percentages.

In the last 15 years the number of tariff pages filed with the Commission has nearly doubled, as has the cost of compiling, publishing, filing and examining those pages. One of the major factors contributing to this avalanche of paper is the necessity for carriers to publish thousands of pages annually to express all their rates as "explicit statements." That is, they must state each rate in cents, in dollars, or in dollars and cents, not only in the first instance, but each time the rates are increased or reduced as well.

The Commission has insisted on the "explicit statement" requirement since the early days of regulation. Section 10762(a)(2) of the Interstate Commerce Act (49 U.S.C. 10762(a)(2)) specifies that motor carrier, freight forwarder and water carrier rates "shall be stated in money of the United States." This section does not apply to railroads, but the Com-

mission has long held that railroad tariffs should state rates in a definite and exact manner without forcing shippers to compute dollar amounts. See, for example, *Rice* v. *Atchison, Topeka & Santa Fe Railroad*, 4 ICC, 228, 246 (1890).

The Commission is empowered, however, to change any of the requirements of Section 10762 "if cause exists in particular instances or as they apply to special circumstances." We have used this power sparingly in the past. Now, however, there appears to be "special circumstances" which warrant a general relaxation of the explicit-statement requirement.

Over the years the requirement has come to be in large measure self-defeating. With the proliferation of general increases and alternative rate scales, the requirement has served to increase the sheer bulk of tariffs to the point where finding the exact rate—even though it is explicitly stated—is often a complicated, confusing and time-consuming task. Moreover, the thousands of tariff pages which compliance with this requirement necessitates carriers to publish annually are an enormous expense to them and, in turn, to the shipping public.

Perhaps the most persuasive argument for discontinuing the explicit-statement requirement, however, is that protection of the public no longer seems to demand it. The universal availability and use of inexpensive, solid-state calculators has transformed the additional computation required by percentage-rate expression from a complicated plan into a time and money-saving scheme. In many cases it is faster and easier to find a base rate and then compute a published percentage of it on a calculator then it is to thumb through pages and pages of rate columns and tables to find its explicitly-stated counterpart.

The rules proposed in the appendix to this notice would relax this long-standing requirement by allowing property tariffs of railroads, freight forwarders and motor common carriers to:

(1) Express rates as percentages of explicitly stated rates contained in the same tariff;

(2) Express the amount of change as a percentage by which explicitly-stated rates in the tariff are to be increased or reduced. This would be implemented by use of a "percentage supplement" filed in connection with any change in the general level of rates; and

(3) Incorporate the percentage changes into the base rates, by use of a special supplement, prior to publication of every third change in the general level of rates.

The application of these rules is limited to property tariffs of railroads, forwarders and motor common carriers because tariffs of other modes are generally not voluminous enough to need, or to derive any significant advantage from, the percentage-expression concept. However, if the comments received indicate otherwise, we will consider extending the application of the rules to other modes where warranted.

It should be noted here that the rules are entirely permissive, not mandatory. If adopted, carriers would be at liberty to retain their present publishing practices. It is our belief, however, that the cost benefits offered by use of the proposed rules will encourage carriers and forwarders to utilize them wherever possible. Under these rules, for example, Class Rate tariffs which have maintained a tautology between the class rates and true percentages (i.e., where the Class 70 rate is identical to 70% of the Class 100 rates, etc.) could eliminate hundreds of pages of rate tables by publishing only the Class 100 rate. A possibility for other tariffs is the use of a "master rate" concept, whereby the tariff need contain only one rate stated in dollars and cents, with all other rates expressed as percentages of the master rate. With this method only one rate in the tariff would have to be updated after a general increase. In other areas, a single tariff item could be used to replace several pages of volume incentive rate tables, aggregate tender rate tables and rate conversion tables, etc.

It should also be noted here that the proposed rules authorizing the filing of "percentage supplements" to provide general changes in the level of rates do not authorize such supplements

to be filed to tariffs which refer to a master tariff for the application of increases or reductions. To do so would be to allow a rate in one tariff to be increased or reduced by a percentage amount shown in another tariff. We feel that this would be putting still another burden on the already overburdened user of master tariffs. We believe, however, that these rules offer an attractive *alternative* to the use of master tariffs. Master tariffs, of course, may be published only on Special Permission authority, and are subject to the updating rules adopted in Ex Parte No. 326, *Regulations Governing the Transfer of General Increases from Master Tariffs into the Individual Tariffs of Railroads or Rail Ratemaking Organizations.*

Percentage supplements may also not be filed to tariffs of motor common carriers which refer to conversion supplements filed under 49 CFR 1310.10(j) for the application of increases or reductions. Under the proposed rules, carriers would have the option of using either the conversion supplement system or the percentage supplement system, but not both.

PART II—SYMBOLIZATION OF TARIFF MATTER RESULTING IN INCREASES

(See Appendix B for Proposed Rules)

Current Commission regulations require that proposed changes in tariff publications be symbolized to identify the effect of the change—that is, whether it is an increase, a reduction, or a change in wording which results in neither an increase nor a reduction. These regulations are designed to allow tariff users to rely on symbolization to (1) discover changes and (2) evaluate those changes. Discovery and evaluation are vital to tariff users' rights to timely protest proposed tariff changes.

The rules proposed in Appendix B are designed to emphasize the importance of these requirements to the tariff user by stipulating that increases arising from tariff changes not properly symbolized are unlawful.

Historically the Commission has maintained a staff whose primary function has been the review of newly-filed tariff matter to ensure compliance with the Commission's tariff regulations, including those regulations concerning symbolization. Faced with the need to re-allocate its resources, the Commission has determined that it can no longer maintain a full force to provide complete tariff-examination services. Very shortly the Commission will implement a plan to review tariff filings on a random sampling basis only. It is only realistic to recognize that some tariff deficiencies previously discovered by the full complement of tariff examiners will not be caught by the sampling net.

We believe it would be inappropriate for tariff users to be burdened with the onerous chore of comparing proposed tariff filings word-for-word or figure-for-figure against existing tariff matter. They should be able to rely on the accuracy of tariff symbolization. The rules proposed here would stipulate that improperly-symbolized changes which result in increases would be considered improperly published and thus invalid and uncollectable. This would offer retroactive protection to tariff users who had been effectively deprived of their right to protest by mis-symbolization.

We realize that this proposal represents a departure from numerous Commission and court decisions in the past. However, the approach suggested here is not without foundation. In *H.J. Baker & Bros., Inc.—Statute of Limitations*, 357 I.C.C. 640 (1978), the entire Commission concluded that improperly symbolized increased rates were not lawful, and were subject to claims for overcharges.

In *Chicago, M., St. P. & P.R. Co.* v. *Alouette Peat Products*, 253 F.2d 449 (1958), the court determined, in essence, that seemingly collectable (applicable) rates were not valid (or collectable) because they had been filed in violation of the tariff-publishing requirements. While this decision dealt with a statutory requirement (the 30-day notice period) rather than a requirement imposed solely by Commission regulations, we believe that the same principle can be, and should be, applied.

The proposed rules would be an extension of the rationale in the *Baker* and *Alouette* cases. They would hold that tariff increases not properly symbolized are unlawful; unlawful tariff provisions are invalid (uncollectable) notwithstanding the passing of the purported effective date of the unlawful publication. Charges assessed on the basis of the invalid provisions would be subject to the usual overcharge claim procedures. Although we would anticipate only rare disagreements on the factual questions of whether published tariff provisions had or had not been properly symbolized, the Commission would stand ready to resolve any such disputes.

We would like to emphasize that the proposed rules pertain only to improperly-symbolized changes resulting in *increases*. However, we welcome any comments on the advisability of extending the rules to encompass improperly-symbolized reductions. While the latter would not appear to have as great a potential for harm to the tariff user, we do realize that improperly-sybmolized reductions could cause hardships to competing carriers.

PART III—STANDARD TITLES AND ITEM NUMBERS FOR COMMONLY PUBLISHED TARIFF RULES

(See Appendix C for Proposed Rules)

Standardization and uniformity of tariff elements is essential not only to facilitate computer capability but also to enable tariff users to determine transportation charges quickly and accurately. We are therefore proposing to adopt regulations requiring standard titles and item numbers for all tariffs and schedules.

In Docket No. 35867 (Sub-No. 1), *Standard Headings and Standard Item Numbers for Commonly Published Rules in Tariffs of Class I Motor Common Carriers of Property and of Agents*, the Commission considered adopting such requirements for motor common carriers. Due to a lack of general support, however, the proceeding was discontinued and carriers and agents were allowed to continue using the voluntary

numbering system formulated by the National Motor Freight Traffic Association (NMFTA) and the National Industrial Traffic League (NITL).

Most of the respondents in that proceeding indicated that they were in favor of standard titles and item numbers. However, they felt that if such a requirement was to be made, the NMFTA-NITL numbering system should be adopted. Although the Commission had reservations about adopting that system at the time, we now believe that the NMFTA-NITL numbering system has proven to be workable and useful as a standardized tariff format scheme. We therefore propose to codify that system in our regulations.

Our review of tariffs currently on file indicates that the agents for motor carriers are for the most part now using the NMFTA-NITL numbering system. However, many motor carriers are not using the format in their individually-filed tariffs and schedules. Thus, our codification of the NMFTA-NITL system would substantially affect these publications. In order to lessen the impact of the proposed regulations, we would allow a gradual conversion to the proposed numbering systems. Such a conversion could be accomplished by requiring that each new motor tariff or motor reissue tariff cancelling an existing tariff utilize the standard title/numbering system. Thus, we would not demand that existing motor tariffs undergo an immediate transition to the new requirements; but we would require that all tariffs be in compliance with the standard system within 5 years of the effective date of the regulations.

Rail carriers and their agents have been utilizing a tariff numbering system which was prescribed by the Railroads' Tariff Research Group (RTRG). We believe the RTRG system has merit and we propose to codify it as a mandatory rail tariff format. For those rail carriers and agents not utilizing the system at present, we would allow a gradual conversion to the required format.

We propose to require that freight forwarders and their agents use the system (motor or rail) which best fits their needs. Again, we would allow for the gradual conversion of their tariffs to the appropriate standard title/numbering systems.

The existing industry-adopted systems do not appear to be appropriate for use in tariffs of the remaining modes of transportation subject to our regulation. Therefore, we do not propose to prescribe standard titles and numbers for them.

We believe that a uniform use of the title/numbering systems will allow for substantial standardization of tariffs and schedules. When used in connection with other proposals presented in this rulemaking proceeding and those which have been implemented in the past, the standard title/numbering systems will also contribute to the simplification of tariffs.

PART IV—STANDARD TARIFF CODES FOR COMMODITY AND POINTS IDENTIFICATION

The purpose of this two-part proposal is to insure that the Commission's tariff requirements are realistically attuned to the needs of the entire transportation community. We are aware of the increasing use of electronic technology as applied to tariff data and, to the extent possible, we intend to accommodate that technology through improved tariff compatibility. In order to accomplish this, we believe that the Commission must take the lead in establishing uniform standards for the most common elements of tariff data.

Two elements common to virtually all aspects of transportation are the points (places), where service is performed, and the commodities (articles or products), which are accorded that service. The rules proposed in this part would revise our tariff requirements to allow the identification of both these elements by code designation.

Subpart (A)—Standard Codes For Commodity Identification

(See Appendix D for Proposed Rules)

Our current regulations require the showing of the *name* of the commodities on which rates apply (or for other purposes). We have been lenient in allowing departures from this requirement in rail tariffs, either through a grant of special permission authority to deviate from the regulations, or through acceptance of publications for "information only." In the latter regard, the filed publications have usually cited the commodity code parenthetically to the naming of the commodity. Under the proposed rules we would allow all modes to utilize the standard commodity code developed and assigned by the Standard Transportation Commodity Code Technical Committee, (which administers the code under the auspices of the Association of American Railroads) as an alternative to *naming* the commodity.

STCC has been a recognized transportation commodity code since 1964, and has gained substantial acceptance—particularly by rail carriers and their users. Although we are aware of efforts to formulate other code structures, much of that effort is designed to produce an acceptable code for international as well as domestic use. Our information is that all such efforts are—at minimum—several years away from fruition.

Although STCC is now used only by rail carriers, the proposed rules would authorize its use by all modes. We do not believe that STCC is merely a one-mode oriented code. The STCC Technical Committee includes representatives of the motor carrier industry and the shipping public, as well as members of the rail industry. The Committee routinely incorporates and/or reconciles commodity descriptions published in the National Motor Freight Classification.

We are therefore proposing to endorse STCC as the *only* valid tariff code for the identification of commodities. This is essential if we are to encourage computer usage. STCC is the chosen code because: (1) there is no other known code that is feasible for tariff use; (2) the STCC already exists in tariff form; and (3) a large segment of the shipping community is familiar with it.

Subpart (B)--Standard Tariff Codes For Points Identification

(See Appendix E for Proposed Rules)

Our current tariff regulations generally require the showing of the *name* of the point or place (city, town, village, county, state, etc.) to, from or at which transportation service is provided. Code letters and/or numbers are permissible only to indicate grouping of points. Under the proposed rules we would allow tariffs to identify points by a specific code in lieu of naming them. The permissible standard code would be that of the *Federal Information Processing Standards Publication 55* (FIPS PUB 55), which is issued by the National Bureau of Standards, U.S. Department of Commerce pursuant to Public Law 89-306, Executive Order 11717, and Part 6 of Title 15, Code of Federal Regulations.

FIPS PUB 55 implements codes for points in the United States as developed and approved by the American National Standards Institute (ANSI). The current issue, dated June 1, 1978, consists of two volumes totaling 1946 pages. The publication includes standard codes for named populated cities, towns, villages, whether incorporated or not, important military and naval installations, townships, Indian reservations, named places that form parts of other places, places important for transportation, industrial or commercial purposes, i.e., unpopulated railroad points, airports and shopping centers.

The code itself is seven characters in length, the first two of which identify the state. The last five numeric characters identify the place within the State and provide an alphabetic ordering of the place names. In addition to the place name and its code, the list also provides the name and code for the county (3 characters) in which the place is located, the ZIP code of the servicing post office, cross-references to former or alternate names, an inclusion code, a class designator code, and a cross-reference to the Worldwide Geographic Location Codes issued by the General Services Administration.

The "inclusion code" identifies those points which are part of other coded points. The former are assigned their own codes but are also cross-referenced to the point within which they are included. This permits users to either recognize such "inclusions" as separate places or to combine them with their parent place.

A "class designator" is also provided for each coded point. Eighteen different classes are established including airports, shopping centers (not part of other places), places that are part of incorporated places, places that are part of populated unincorporated places, rural communities, urban communities, and unpopulated transport points. "Unpopulated transport points" are named stations, factories, quarries, prisons, institutions, industrial parks, or similar facilities recognized as a point of origin or destination for transportation, but not qualifying for other separately defined classes of places.

Copies of the current edition are for sale ($12.50) by the National Technical Information Service (NTIS), U.S. Department of Commerce, Springfield, VA 22161. When ordering refer to NBS-FIPS-PUB-55. Two additional forms of this material are also available and for sale: Magnetic Tape, PB 274-150 ($125) and Microfiche, PB 274-146 ($12.50). Additional information may be obtained from the NTIS Computer Products Office (703) 557-4763.

Copies of American National Standard X3.47-1977, *Structure for the Identification of Named Populated Places and Related Entities of the States of the United States for Information Interchange*, is available ($4.00) from the American National Standards Institute, 1430 Broadway, New York, NY 10018.

The Department of Commerce, National Bureau of Standards, Institute for Computer Sciences and Technology serves as maintenance agent for FIPS PUB 55. Requests for additions, deletions or revisions are addressed to that office. Quarterly amendments to FIPS PUB 55 are planned. The initial publication and all future amendments would be filed

with this Commission in tariff form, and it is anticipated that no fees would be assessed for carrier participation in that tariff.

FIPS PUB 55 has been developed for use as a standard code throughout the Federal sector. Beyond that, it is intended for use to comply with the reporting requirements of the private sector to the various Federal agencies. At this point we question whether the transportation community (including this Commission) should remain aloof from that standard code.

We realize that other point codes are being utilized by many shippers, carriers and others in existing electronic data transmission systems. Perhaps the most notable of these is the *Standard Points Location Code* (SPLC). It is not our purpose to thwart other point codes nor to displace or disrupt established data systems. To facilitate coordination of SPLC with FIPS PUB 55, interagency agreements have been drawn which call for joint efforts of this Commission, the Department of Transportation and the U.S. Army Corps of Engineers to develop a one-for-one, code-for-code "bridge" between SPLC and FIPS PUB 55 for points in the United States. The bridge would be incorporated in future editions of FIPS PUB 55.

This rulemaking proceeding is instituted under the authority of section 553 of the Administrative Procedure Act (5 U.S.C. 553) and section 10762(b)(1) of the Interstate Commerce Act (49 U.S.C. 10762(b)(1).

This decision does not appear to affect significantly the quality of the human environment of energy consumption.

We propose to adopt the rules set forth in the appendices to this notice.

Decided: October 9, 1979.

By the Commission, Chairman O'Neal, Vice Chairman Stafford, Commissioner Gresham, Clapp, Christian, Trantum, Gaskins and Alexis. Commissioner Alexis not participating.

Agatha L. Mergenovich,

Secretary.

Appendix A—Proposed Rules To Govern Percentage Expression of Rates, Charges, and Amounts Of Increase Or Reduction

We propose to amend 49 CFR, Chapter X, Subchapter D, as follows:

1. By revising § 1300.4(i)(1) to read as follows:

§ 1300.4 Contents of tariffs.

Tariffs shall contain, in the order named:

* * * * *

(i) *Rates.* (1) A statement of the rates and the places from, to, and between which they apply, arranged in a simple and systematic manner. At least one of the rates shall be explicitly stated (per 100 pounds, ton, car or other unit) in dollars and cents in lawful money of the United States. Other rates in the tariff may be expressed as percentages of the stated rates, provided that the tariff clearly explains how to compute the other rates, including how to dispose of fractions. A rate may not be expressed as a fraction or multiple of another rate, as a percentage of a rate contained in another tariff, or as a percentage of another rate which is itself expressed as a percentage. A tariff may be converted to percentage-rate expression only by reissue, not by amendment.

2. By adding § 1300.9(n) to read as follows:

§ 1300.9 Amendments and supplements.

* * * * *

(n) *Percentage supplements to provide general rate changes.* A supplement, which expresses the amount of change as a percentage by which the tariff's explicitly-stated rates and charges are to be increased or reduced, may be filed to any tariff to provide a general change in the level of all or substantially all rates and charges, or all or substantially all the rates and charges in a specific category in the tariff. This

supplement will be subject to the regulations contained in Part 1312 of this chapter.

3. By deleting the first two sentences and the first word of the third sentence of § 1310.7(a)(2), and replacing them with the following:

§ 1310.7 Statement of rates (rule 7).

(a) *Rates must be clear and explicit.*

* * * * *

(2) The rates and the places from, to, and between which they apply shall be arranged in a simple and systematic manner. At least one of the rates shall be explicitly stated in dollars and cents in lawful money of the United States. Other rates in the tariff may be expressed as percentages of the stated rates, provided the tariff clearly explains how to compute the other rates and how to dispose of fractions. A rate may not be expressed as a fraction or multiple of another rate, as a percentage of a rate contained in another tariff, or as a percentage of a rate which is itself expressed as a percentage. A tariff may be converted to a percentage-rate expression only by reissue, not by amendment. All explicitly-stated rates * * *

* * * * *

4. By deleting § 1310.7(c) which now prohibits the expression of class rates as percentages, fractions or multiples of another rate.

5. By adding § 1310.10(k) to read as follows:

§ 1310.10 Amendments (rule 10).

* * * * *

(k) ***Percentage supplements to provide general rate changes.*** **A supplement which expresses the amount of change as a percentage by which the tariff's explicitly stated rates and charges are to be increased or reduced may be filed to any tariff to provide a general change in the level of all or substantially all**

the rates and charges, or all or substantially all the rates and charges in a described category in the tariff. This supplement will be subject to the regulations contained in Part 1312 of this chapter.

6. By adding Part 1312 to read as follows:

PART 1312—PERCENTAGE SUPPLEMENTS

Sec.

1312.1 Percentage supplements to provide general rate changes.

1312.2 Supplements to transfer rate changes from percentage supplements into base rates.

Authority: 5 U.S.C. 553 and 49 U.S.C. 10762(b)(1).

§ 1312.1 Percentage supplements to provide general rate changes.

(a) A percentage supplement shall contain an application provision reading substantially as follows:

> Except as provided in subsequent amendments to this tariff, all explicitly stated rates and charges in this tariff are [specify whether increased or reduced] as follows for the period this supplement is in effect.

The supplement shall state where any exceptions to its application are listed. If not all of the explicitly-stated rates are being changed, the provisions shall state the exact category of rates being changed or list the items, sections, etc., of the tariff which contain them.

(b) The supplement shall show how to compute the increased or reduced rates from the percentages shown; how to dispose of fractions; and how to compute multiple factor rates made by the use of arbitraries or other means.

(c) The supplement shall have an expiration date which must be within one year from its effective date. The title page shall indicate, in the top margin, whether the changes are increases or reductions. If both, "as indicated" shall be added,

and the different categories of changes shall be appropriately referenced.

(d) Only one percentage supplement to a tariff may be in effect at one time. A percentage supplement may not be reissued with the same or an earlier expiration date unless the Commission requests its reissue. The application of changes in a percentage supplement may not be extended by a like supplement providing essentially the same increases or reductions. A percentage supplement reflecting a change in the general rate level may, however, cancel the preceding percentage supplement reflecting a change in the general rate level and incorporate that change (and related provisions) into the new percentage supplement. No percentage change may be so incorporated more than once.

(e) Only matter concerning the percentage change and its application may be published in the supplement.

(f) An exception item or note may not be republished from the percentage supplement into a regular supplement of a bound tariff or incorporated into the tariff proper of a loose-leaf tariff.

(g) Tariff amendments containing explicitly-stated rates or charges becoming effective during the effectiveness of a percentage supplement shall state whether or not they are subject to the provisions of the percentage supplement.

(h) Percentage supplements shall be exempt from the terms of §§ 1300.9(e) and 1310.9(d) governing the number of supplements and volume of supplemental matter permissable.

(i) The provisions of this section do not authorize the publication and filing of so-called master tariffs or connecting link supplements, and percentage supplements may not be filed to tariffs which refer to a master tariff for the application of increases or reductions.

(j) Percentage supplements may change tariff matter which will not have been in effect for 30 days. Subsequent amendments filed prior to the effective date of the percentage

supplement may change or cancel, on lawful notice, matter changed by the percentage supplement before that change has been in effect for 30 days.

§ 1312.2 Supplements to transfer rate changes from percentage supplements into base rates.

(a) A supplement (not a percentage supplement) may be filed to a bound tariff for the primary purpose of incorporating into the explicitly-stated base rates all applicable changes effected by use of a percentage supplement filed under § 1312.1 of this Part. The supplement may contain other matter brought forward from prior supplements, provided those supplements are cancelled. The supplement shall bring forward all explicitly-stated rates in the original tariff and prior supplements even though some rates already include all applicable increases or reductions effected by means of percentage supplements.

(b) The title pages of supplements issued under authority of this section shall bear the following notation:

> Issued under authority of 49 CFR 1312.2. This supplement contains all the explicitly-stated rates and charges provided by this tariff in effect on the effective date of this supplement.

(c) This paragraph applies to rail carriers only. If different increases or reductions apply on related articles shown in an item or descriptive listing of commodities, the rates may be brought forward into the supplement on the basis of the increases or reductions applying to the predominant article in the item or description, provided that a statement is included in the supplement that this has been done. The rate changes shall be appropriately referenced except as specified in paragraph (d) of this section for exceptions concerning symbolization.

(d) Symbolization of the increases and reductions (see §§ 1300.4(m) and 1310.10(f) resulting from the normal rounding off of fractions, or from the use of predominant article

authority in the case of rail carriers, may be omitted in the supplement providing the supplement is filed on not less than 45 days' notice and the title page of the supplement also bears the following statement:

> This supplement contains changed basis of rates, charges and provisions which result in increases and reductions. The supplement also contains variations in wording which result in no change in the rates and charges. These changes are not shown by use of uniform symbols which have been omitted under authority of 49 CFR 1312.2.

(e) Supplements issued under authority of this section shall be exempt from §§ 1300.9(e) and 1310.9(d) governing the number of supplements and the volume of supplemental matter permissible.

Appendix B—Proposed Rules To Govern Symbolization Of Changed Tariff Matter Resulting In Increases

§§ 1300.2, 1303.4, 1304.2, 1306.5, 1307.5, 1308.2 and 1310.10 [Amended]

We propose to amend 49 CFR Parts 1300, 1303, 1304, 1306, 1307, 1308 and 1310 by adding the following new paragraph to be designated, respectively, as § 1300.2(a)(4), § 1303.4(d)(3) § 1304.2(c), § 1306.5(b)(2), § 1307.5(r)(1), § 1308.2(a) and § 1310.10(f)(5):

Changes resulting in increases which are not identified by proper symbols shall be considered unlawfully published and filed and therefore invalid and not collectable. In such cases, the lawful provisions will be those which were purportedly superseded. Invalid provisions shall be cancelled by publications which shall bring forward, or properly amend, provisions which have remained in effect by reason of invalid publication.

Appendix C—Proposed Rules To Govern Standard Titles And Item Numbers For Commonly Published Tariff Rules

We propose to amend 49 CFR Chapter X, Subchapter D as follows:

1. By revising § 1300.4(h)(2) to read as follows:

§ 1300.4 Content of tariffs.

* * * * *

(h) *Rules governing the tariffs.*

* * * * *

(2)(i) Each rule shall be assigned the appropriate item number and title from the following list. If a title includes subjects not treated in the rule, those subjects may be eliminated from the title.

Item and Title

5 Description of Governing Classification, Exceptions and Rules Tariffs
10 Station List and Conditions
15 Explosives, Dangerous Articles
20 Reference to Tariffs, Items, Notes, Rules, etc.
25 Terminal or Transit Privileges or Services
30 Perishable Freight
35 Transfer Between Connecting Carriers
40 Consecutive Numbers
45 Capacities and Dimension of Cars
50 Combination Rates
55 Substitution of Motor Service for Rail or Water Service
60 National Service Order Tariff
65 Proportional Rates—application
70 Alternation
75 Method of Canceling Items
80 Intermediate Application—origin
85 Intermediate Application—destination
90 Fourth Section Authorities
100 Method of Denoting Reissued Matter in Supplements
105 Straight or Mixed CL Application

(ii) A carrier or agent may assign a title and number of its choosing for matter not listed in subparagraph 2(i), provided the title and number chosen do not conflict with those listed.

(iii) If a title in subparagraph 2(i) does not properly identify a rule's content, qualifying words, phrases or subtitles may be added. When qualifying words or phrases are used, the prescribed title shall be followed by a dash and the added words, for example: "Alternation—C.L. Rates—Varying Minimum Weights." Subtitles or references to excepted classification rules shall follow the title.

(iv) When it is necessary or practicable to split a rule into two or more parts, the prescribed item number may be subdivided. The first part of the rule (which shall contain the general or master rule, if any) must be assigned the prescribed item number without a numerical suffix. Each subdivision shall be assigned a compound number, which shall be constructed by use of the prescribed number followed by a hyphen, than a new series of numbers, for example: item 70-1, 70-2, 70-3, etc., in numerical sequence. Each subdivision must show the prescribed title.

(v) Exceptions to a rule may be included in the general rule or arranged in items immediately following the rule to which exception is taken. In the latter case, exception items are to use the standard item number of the general rule followed by a suffix—for example, exceptions to item 85 would use items 85-1, 85-2, etc.

2. By revising § 1307.5(l) to read as follows:

§ 1307.5 Form and content of schedules.

* * * * *

(l) *Rules.* (1) Rules and other provisions affecting rates and charges shall be published following the index of points. Each rule or regulation shall be given a separate item number. Where the subjects shown in § 1310.4(h)(4)(i) of this chapter are to be provided for in schedules, the rules covering them shall bear the titles and be assigned the item numbers listed in § 1310.4(h)(4)(i) of this chapter.

(2) A carrier may assign a title and number of its choosing for matter not listed in § 1310.f(h)(4)(i) of this chapter, provided the title and number chosen do not conflict with those listed.

(3) If a title listed in § 1310.4(h)(4)(i) of this chapter does not properly identify a rule's content, qualifying words, phrases or subtitles may be added. When qualifying words are used, the prescribed title shall be followed by a dash and the added words, for example: "Bills of Lading—Order Notify." Subtitles or references to excepted classification rules shall follow the title.

(4) When it is necessary or practicable to split a rule into two or more parts, the prescribed item number may be subdivided. The first part of the rule (which shall contain the general or master rule, if any) must be assigned the prescribed item number without a numerical suffix. Each subdivision must be assigned a compound number, which shall be constructed by use of the precribed number followed by a hyphen, then a new series of numbers—for example, item 390-1, 390-2, 390-3, etc., in numerical sequence. Each subdivision must show the prescribed title.

(5) Exceptions to a rule may be included in the general rule or arranged in items immediately following the rule to which exception is taken. In the latter case, exception items are to use the standard item number of the general rule followed by a suffix—for example, exceptions to item 510 would use items 510-1, 510-2, etc.

* * * * *

§ 1309.1 [Amended]

3. By adding the following sentence at the end of § 1309.1: "Rules contained in tariffs shall be numbered and titled using the system prescribed either in § 1300.4(h)(2)(i) of this chapter or in § 1310.4(h)(4)(i) of this chapter."

4. By adding the following subparagraph (4) to § 1310.4(h):

§ 1310.4 Form, size, and printing (rule 4).

* * * * *

(h) * * *

(4)(i) Each rule shall be assigned the appropriate item number and title from the following list. If a title includes subjects not treated in the rule, those subjects may be eliminated from the title.

Item and Title

100 Governing publications.
110 to 119 Definitions.
150 Application of tariff, schedule.
160 to 290 Application of rates.
299 Absorptions.
300 Advancing charges.
305 Advertising on carrier equipment.
310 Advertising or premiums.
315 to 335 Allowances.
340 Arbitraries or differentials.
345 Arrival notice and undelivered freight.
350 Assembling or distributing freight.
360 Bills of lading.
370 Bulk freight.
381 Cancellation of items.
382 Cancellation of looseleaf pages.
390 Capacity loads.
405 Carrier trade names.
407 to 419 Claims, loss and damage
420 Classification of articles—General.
421 Classification by analogy.
422 Classification of combined articles.
423 Classification of loose articles.
424 Classification of parts or pieces of a complete article.
426 Classification of reconditioning bags.

428 Classification of various documents included with freight.
430 COD shipments.
435 Collection of charges.
440 Commercial zones.
455 Consecutive numbers.
460 Consolidation of shipments.
465 Containers.
470 Control and exclusive use of vehicles.
480 Customs or in-bond freight.
490 Density.
500 Detention—Vehicles with power units.
501 Detention—Vehicles without power units.
502 Detention—LTL or AQ shipments.
510 Distances.
520 Equipment.
535 Expiration dates.
540 Explosives and other dangerous articles.
550 Export, import, coastwise or intercoastal freight.
560 Extra labor.
565 Fractions.
566 Handling freight not adjacent to vehicle.
568 Heavy or bulky freight.
570 Impracticable operations.
575 Light or bulky freight.
578 Loading by consignor—Unloading by consignee.
580 Marking or tagging freight.
595 Maximum charge.
600 Meat hooks or racks.
610 Minimum charge.
640 Mixed shipment—LTL.
645 Mixed shipment—TL or Vol.
647 Notification prior to delivery.
650 Operating rights.
670 Over dimension freight.
680 to 689 Packing or packaging.
710 Pallets, platforms or skids.
720 Payment of charges.

730 Peddler truck shipments.
740 Permits, special.
750 Pickup or delivery service.
754 Pickup or delivery service—Sundays or holidays.
755 Pickup or delivery service—Saturdays.
756 Pickup or delivery service—Saturdays, Sundays, or holidays.
765 Precedence of rates.
766 Precedence of rules.
770 Prepayment.
780 Prohibited or restricted articles.
784 Proof of delivery.
800 Proportional rates.
810 Protective service.
820 Reconsignment or diversion.
830 Redelivery.
845 Reference to tariffs, schedules.
846 Reissued matter, method of treating.
848 Released value.
850 Reporting charge.
880 Sealing of trucks.
883 Shipments tendered as a truckload.
885 Single shipment pickup.
887 Sorting or segregating.
890 Special services.
900 Stopoffs.
910 Storage.
920 Substitution of service.
940 Terminal areas.
950 Terminal charges at ports.
957 Tools.
959 Transfer of lading.
960 Transfer of service.
970 Transit privileges or services.
980 Unnamed points.
985 Vehicle furnished but not used.
990 Weighing and weights.
992 Weight verification.

995 Weights—Gross weights and dunnage.
997 Weights—Minimum weight factor.

(ii) A carrier or agent may assign a title and number of its choosing for matter not listed in subparagraph (4)(i), provided the title and number chosen do not conflict with those listed.

(iii) If a title in subparagraph (4)(i) does not properly identify a rule's content, qualifying words, phrases or subtitles may be added. When qualifying words or phrases are used, the prescribed title shall be followed by a dash and the added words, for example: "Bills of Lading—Order Notify." Subtitles or references to excepted classification rules shall follow the title.

(iv) When it is necessary or practicable to split a rule into two or more parts, the prescribed item number may be subdivided. The first part of the rule (which shall contain the general or master rule, if any) must be assigned the prescribed item number without a numerical suffix. Each subdivision must be assigned a compound number, which shall be constructed by use of the prescribed number followed by a hyphen, then a new series of numbers—for example, item 390-1, 390-2, 390-3, etc., in numerical sequence. Each subdivision must show the prescribed title.

(v) Exceptions to a rule may be included in the general rule or arranged in items immediately following the rule to which exception is taken. In the latter case, exception items are to use the standard item number of the general rule followed by a suffix—for example, exceptions to item 568 would use items 568-1, 568-2, etc.

Appendix D—Proposed Rules To Govern Standard Codes For Commodity Identification

§ 1300.34, 1304.45, 1307.18, 1308.15, 1308.12, 1310.36 [Added]

We propose that 49 CFR, Parts 1300, 1304, 1307, 1308 and 1310 be amended by adding to each part the following new

sections to be designated respectively as §§ 1300.34, 1304.45, 1307.18, 1308.15, 1308.112 and 1310.36, each to be entitled "Standard Codes for Commodity Identification."

(a) *Definition.* As used in this part, the term "standard transportation commodity code" (STCC) means the standard transportation commodity codes assigned by the Association of American Railroads as contained in tariffs filed with the Commission.

(b) *Use.* Standard transportation commodity codes may be used instead of names to identify commodities in tariffs or schedules. Tariffs or schedules using the codes shall contain, or refer to a tariff publication which contains, the code assignments. Carriers do not need to be shown as participants in the code assignment tariff, and any tariff or schedule may refer to it. The standard transportation commodity codes are the only codes, standing alone, that may be used to identify commodities.

(c) *Listing.* Where the regulations in this part require commodity names to be published in alphabetical order, the standard transportation commodity codes shall be published in numerical order.

Appendix E—Proposed Rules To Govern Standard Codes For Points Identification

§§ 1300.33, 1303.38, 1304.44, 1306.19, 1307.17, 1308.14, 1308.111 and 1310.35 [Added]

We propose to amend 49 CFR, Parts 1300, 1303, 1304, 1306, 1307, 1308 and 1310 by adding to each part the following new sections to be designated respectively as §§ 1300.33, 1303.38, 1304.44, 1306.19, 1307.17, 1308.14, 1308.111 and 1310.35, each to be entitled "Standard Codes for Points Identification."

(a) *Definition.* As used in this part, the term "standard codes for points identification" means the codes assigned to points (places) by the Federal Information Processing Standards Publication 55 (FIPS PUB 55), issued by the National

Bureau of Standards, U.S. Department of Commerce, and as contained in tariffs filed with the Commission.

(b) *Use.* Standard codes for points identification may be used in tariffs or schedules to identify points instead of the names of the points. The standard codes for points identification are the only codes, standing alone, that may be used to identify points and places. This does not prohibit the use of other codes when used parenthetically with named points.

(c) *Listing.* If the regulations in this part require the point (place) names to be published in alphabetical order, the standard codes for point identification shall be published in alphanumerical order—i.e., arranged alphabetically by State code with points within each State sublisted in numerical order.

[FR Doc. 79-32092 Filed 10-17-79; 8:45 am]

BILLING CODE 7035-01-M

APPENDIX F

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

Nos. 80-2099, 80-2327

ICC Ex Parte 370

ABERDEEN & ROCKFISH RAILROAD COMPANY
& Other Railroads,

Petitioners,

v.

The UNITED STATES, OF AMERICA and
The INTERSTATE COMMERCE COMMISSION,

Respondents.

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,

Petitioner,

v.

The UNITED STATES, OF AMERICA and
The INTERSTATE COMMERCE COMMISSION,

Respondents.

Petitions for Review of an Order of the Interstate Commerce Commission

Before GARZA, POLITZ and WILLIAMS, Circuit Judges

JUDGEMENT

These causes came on to be heard on the petitions of Aberdeen & Rockfish Railroad Co., et al., and National Motor Freight Traffic Association, Inc., for review of a portion of an order of the Interstate Commerce Commision and were argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petitions for review are denied; stay vacated;

IT IS FURTHER ORDERED that petitioner pay to respondent the costs on appeal to be taxed by the Clerk of this Court.

AUGUST 9, 1982

ISSUED AS MANDATE:

APPENDIX G

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

Nos. 80-2099, 80-2327

ABERDEEN & ROCKFISH RAILROAD COMPANY
& Other Railroads,
Petitioners,

v.

The UNITED STATES, OF AMERICA and
The INTERSTATE COMMERCE COMMISSION,
Respondents.

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,
Petitioner,

v.

The UNITED STATES, OF AMERICA and
The INTERSTATE COMMERCE COMMISSION,
Respondents.

Petitions for Review of an Order of the Interstate Commerce Commission.

ON SUGGESTIONS FOR REHEARING EN BANC

(Filed September 22, 1982)

(Opinion August 9, 5 Cir., 1982,____F.2d____).
(September 22, 1982)

Before GARZA, POLITZ and WILLIAMS, Circuit Judges

PER CURIAM:

(X) Treating the suggestions for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing and DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal

Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestions for Rehearing En Banc are DENIED.

( ) Treating the suggestions for rehearing en banc as petitions for panel rehearing, the petitions for panel rehearing are DENIED. The judges in regular active service of this court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35), Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/_____

United States Circuit Judge

APPENDIX H

Pertinent Provisions of the Interstate Commerce Act (49 U.S.C.)

* * *

§ 10704. Authority and criteria: rates, classifications, rules, and practices prescribed by Interstate Commerce Commission

(a)(1) When the Interstate Commerce Commission, after a full hearing, decides that a rate charged or collected by a carrier for transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, or that a classification, rule, or practice of that carrier, does or will violate this subtitle, the Commission may prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed. The Commission may order the carrier to stop the violation. When a rate, classification, rule, or practice is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate and shall adopt the classification and observe the rule or practice prescribed by the Commission.

(2) The Commission shall maintain and revise as necessary standards and procedures for establishing revenue levels for rail carriers providing transportation subject to its jurisdiction under that subchapter that are adequate, under honest, economical, and efficient management, to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on captial employed in the business. The Commission shall make an adequate and continuing effort to assist those carriers in attaining revenue levels prescribed under this paragraph. However, a rate, classification, rule, or practice of a rail carrier may be maintained at a particular level to protect the traffic of another carrier or mode of transportation only if the Commission finds that the rate or classification, or rule or practice related to it, reduces or would reduce the going concern value of the carrier charging the rate. Revenue levels established under this paragraph should—

(A) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation; and

(B) attract and retain capital in amounts adequate to provide a sound transportation system in the United States.

(3) The Commission shall conclude a proceeding under paragraph (2) of this subsection within 180 days after the effective date of Staggers Rail Act of 1980 and thereafter as necessary.

(4) On the basis of the standards and procedures under paragraph (2) of this subsection, the Commission shall, within 180 days after the effective date of the Staggers Rail Act of 1980 and on an annual basis thereafter, determine which rail carriers are earning adequate revenues.

(b)(1) When the Commission decides that a rate charged or collected by—

(A) a motor common carrier for providing transportation subject to its jurisdiction under subchapter II of chapter 105 of this title by itself, with another motor common carrier, with a rail, express, or water common carrier, or any of them;

(B) a water common carrier for providing transportation subject to its jurisdiction under subchapter III of chapter 105 of this title; or

(C) a freight forwarder for providing service subject to its jurisdiction under subchapter IV of chapter 105 of this title;

or that a classification, rule, or practice of that carrier, does or will violate this chapter, the Commission shall prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed.

(2)(A) When prescribing a rate, classification, rule, or practice for transportation or service by common carriers

other than by rail carrier, the Commission shall consider, among other factors, the effect of the prescribed rate, classification, rule, or practice on the movement of traffic by that carrier.

(B) When prescribing a rate, classification, rule, or practice for transportation or service by common carriers other than by rail carrier or motor carrier of property, the Commission shall consider, among other factors, the need for revenues that are sufficient, under honest, economical, and efficient management, to let the carrier provide that transportation or service.

(3) If the carrier is a motor or water common carrier or a freight forwarder, the Commission shall also consider the need, in the public interest, of adequate and efficient transportation or service by that carrier at the lowest cost consistent with providing that transportation or service.

(4) If the carrier is a motor common carrier or a freight forwarder, the Commission shall also consider the inherent advantages of transportation by motor common carrier or the inherent nature of freight forwarding, respectively.

(c)(1) When the Commission finds that a minimum rate of a contract carrier for transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title, or a rule or practice related to the rate or the value of the service under it, violates this chapter or the transportation policy of section 10101 of this title, the Commission may prescribe the minumum rate, rule, or practice for the carrier that is desirable in the public interest and will promote that policy. In prescribing the rate, the Commission may not give a motor or water contract carrier an advantage or preference in competition with a motor or water common carrier, respectively, if an advantage or preference is unreasonable or inconsistent with the public interest and the transportation policy of section 10101 of this title.

(2) When prescribing a minimum rate, or rule or practice related to a rate, for a contract carrier, the Commission shall consider—

(A) the cost of the transportation provided by the carrier; and

(B) the effect of a prescribed minimum rate, or rule or practice, on the movement of traffic by that carrier.

(d) In a proceeding involving competition between carriers of different modes of transportation subject to this subtitle, except rail carriers, the Commission, in determining whether a rate is less than a reasonable minimum rate, shall consider the facts and circumstances involved in moving the traffic by the mode of carrier to which the rate is applicable. Subject to the transportation policy of section 10101 of this title, rates of a carrier may not be maintained at a particular level to protect the traffic of another mode of transportation.

(e) In a proceeding involving a proposed increase or decrease in rail carrier rates, the Commission shall specifically consider allegations that the increase or decrease would (1) change the rate relationships between commodities, ports, places, regions, areas, or other particular descriptions of traffic (without regard to previous Commission consideration or approval of those relationships), and (2) have a significant adverse effect on the competitive position of shippers or consignees served by the rail carrier proposing the increase or decrease. The Commission shall investigate to determine whether the change or effect violates this subtitle when it finds that those allegations are substantially supported on the record. The investigation may be made either before or after the proposed increase or decrease becomes effective and either in that proceeding or in another proceeding.

(f) The Commission may begin a proceeding under this section on its own initiative or on complaint. A complaint under subsection (a) of this section must be made under section 11701 of this title, but the proceeding may also be in extension of a complaint pending before the Commission. A complaint under subsection (c) of this section must contain a full statement of the facts and the reasons for the complaint and must be made under oath.

* * *

§ 10707a. Zone of rail carrier rate flexibility

(a) In this section—

(1)(A) "base rate" means, with respect to the transportation of a particular commodity (i) for the 24-month period beginning on October 1, 1980, the rate in effect on October 1, 1980, (ii) for the 24-month period beginning on October 1, 1982, the rate in effect on October 1, 1982, and (iii) for the 5-year period beginning on October 1, 1984, and for each subsequent 5-year period, the rate in effect on the first day of the applicable 5-year period.

(B) If no rate exists for the transportation of a particular commodity on October 1, 1980, the base rate for the transportation of such commodity shall be the rate established by the rail carrier (divided by the latest rail cost adjustment factor published by the Commission), unless such rate is found to be unreasonable by the Commission, in which case the base rate shall be the rate authorized by the Commission (divided by the latest rail cost adjustment factor published by the Commission).

(2)(A) "adjusted base rate" means the base rate for the transportation of a particular commodity multiplied by the latest rail cost adjustment factor published by the Commission pursuant to this paragraph.

(B) Commencing with the fourth quarter of 1980, the Commission shall, as often as practicable but in no event less often than quarterly, publish a rail cost adjustment factor which shall be a fraction, the numerator of which is the latest published Index of Railroad Costs (which index shall be compiled or verified by the Commission, with appropriate adjustments to reflect the changing composition of railroad costs, including the quality and mix of material and labor), and the denominator of which is the same index for the fourth quarter of 1980, or for the fourth quarter of 1982 or for the fourth quarter or every fifth year thereafter, as appropriate.

(b)(1) Except as provided in paragraph (2) of this subsection, a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may increase any rate over which the Commission has jurisdiction under section 10709 of this title so long as the increased rate is not greater than the adjusted base rate for the transportation involved, plus any rate increases implemented under subsection (c) or (d) of this section.

(2) A rate increase authorized under this subsection may not be found to exceed a reasonable maximum for the transportation involved.

(3) A rail carrier may not increase a rate under this subsection to the extent that the cost increases to such carrier due to inflation are recovered through (A) general rate increases pursuant to section 10706 of this title, or (B) inflation-based rate increases under section 10712 of this title applicable to that rate.

(c)(1) During the 12-month period beginning on the effective date of the Staggers Rail Act of 1980 and during each of the 3 succeeding 12-month periods, a rail carrier may, in addition to rate increases authorized under subsection (b) of this section, increase any rate over which the Commission has jurisdiction under section 10709 of this title by an annual amount of not more than 6 percent of the adjusted base rate, except that in no event shall the total increase under this subsection result in a rate which is more than 118 percent of the adjusted base rate.

(2)(A) If any portion of a rate increase under this subsection is not implemented in the year in which it is authorized, such portion may, except as provided in subparagraph (B) of this paragraph, be implemented only in the next succeeding year.

(B) If any portion of the total rate increase authorized under this subsection is not implemented by the end of the 4-year period beginning on the effective date of the Staggers

Rail Act of 1980, such portion may be implemented in the next 2 succeeding years, except that in no event may a rail carrier increase a rate under this subsection or under subsection (d) of this section in either of such 2 succeeding years by an annual amount of more than 10 percent of the adjusted base rate.

(d)(1) Except as provided in paragraph (3) of this subsection, during the 12-month period beginning on October 1, 1984, and during each succeeding 12-month period, a rail carrier may, in addition to rate increases under subsection (b) of this section, increase any rate over which the Commission has jurisdiction under section 10709 of this title by an annual amount of not more than 4 percent of the adjusted base rate.

(2) No portion of any rate increase under this subsection which is not implemented in the year in which it is authorized may be implemented in any other year.

(3)(A) The provisions of this subsection shall not apply to a rail carrier proposing to increase a single line rate if such carrier earns adequate revenues, as determined by the Commission under section 10704(a)(2) of this title.

(B) The Commission shall, after a hearing on the record, prescribe such rules with respect to joint rates as necessary to ensure that rail carriers which earn adequate revenues, as determined under section 10704 (a)(2) of this title, do not receive the rate increases authorized by this subsection unless the Commission determines that it is unable to prescribe such rules without precluding rail carriers not earning adequate revenues from receiving the rate increases authorized under this subsection.

(e)(1) Notwithstanding the provisions of section 10707 of this title, in the case of any rate increase by a rail carrier that is authorized under subsection (c) or (d) of this section—

(A)(i) the Commission may not suspend such rate increase pending final Commission action; and

(ii) except as provided in paragraph (2) of this subsection, the Commission may not begin an investigation

proceeding under section 10707 of this title with respect to the reasonableness of such rate increase; but

(B) an interested party may file a complaint under section 11701(b) of this title alleging that such rate increase violates the provisions of this subtitle.

In considering any complaint challenging a rate increase that is authorized under subsection (c) of this section and that results in a revenue-variable cost percentage that is less than the lesser of the percentages described in clauses (i) and (ii) of paragraph (2)(A), the Commission shall, in determining the reasonableness of such rate increase, give due consideration to whether the carrier proposing the rate increase has attained adequate revenues, as determined by the Commission under section 10704(a)(2) of this title, giving regard to preventing a carrier with adequate revenues from realizing excessive profits on the traffic involved and also the policy of bringing to an adequate level the revenues of carriers not having an adequate revenue level.

(2)(A) If a rate increase authorized under this section in any year results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than—

(i) 20 percentage points above the revenue-variable cost percentage applicable in that year under section 10709(d) of this title; or

(ii) a revenue-variable cost percentage of 190 percent, whichever is less, the Commission may, on its own initiative, or on complaint of an interested party, begin an investigation proceeding to determine whether the proposed rate increase violates this subtitle.

(B) In determining whether to investigate or not to investigate any proposed rate increase that results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the lesser of the percentages described in clauses (i) and (ii) of subparagraph (A) of this paragraph (without regard to whether such rate increase is authorized under this section), the Commission

shall set forth its reasons therefor, giving due consideration to the following factors:

(i) the amount of traffic which is transported at revenues which do not contribute to going concern value and efforts made to minimize such traffic;

(ii) the amount of traffic which contributes only marginally to fixed costs and the extent to which, if any, rates on such traffic can be changed to maximize the revenues from such traffic; and

(iii) the impact of the proposed rate or rate increase on the attainment of the national energy goals and the rail transportation policy under section 10101a of this title, taking into account the railroads' role as a primary source of energy transportation and the need for a sound rail transportation system in accordance with the revenue adequacy goals of section 10704 of this title.

This subparagraph shall not be construed to change existing law with regard to the nonreviewability of such determination.

(c) In determining whether a rate is reasonable, the Commission shall consider, among other factors, evidence of the following:

(i) the amount of traffic which is transported at revenues which do not contribute to going concern value and efforts made to minimize such traffic;

(ii) the aomount of traffic which contributes only marginally to fixed costs and the extent to which, if any, rates on such traffic can be changed to maximize the revenues from such traffic; and

(iii) the carrier's mix of rail traffic to determine whether one commodity is paying an unreasonable share of the carrier's overall revenues.

(f) In any proceeding under this section, evidence of the underlying rail carrier rate is admissible.

(g) A finding by the Commission that a rate increase exceeds the increase authorized under this section does not establish a presumption that (1) the rail carrier proposing such

rate increase has or does not have market dominance over the transportation to which the rate applies, or (2) the proposed rate exceeds or does not exceed a reasonable maximum.

(h) The authority of the Commisison to determine and prescribe reasonable rules, classifications, and practices may not be used, directly or indirectly, to limit the rates which rail carriers are otherwise authorized to establish under this subtitle.

* * *

§ 10709 Determination of market dominance in rail carrier rate proceedings

(a) In this section, "market dominance" means an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies.

(b) When a rate for transportation by a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title is challenged as being unreasonably high, the Commission shall determine, within 90 days after the start of a proceeding under section 10707 of this title to investigate the lawfulness of that rate, whether the carrier proposing the rate has market dominance over the transportation to which the rate applies. The Commission may make that determination on its own initiative or on complaint. A finding by the Commission that the carrier does not have market dominance is determinative in a proceeding under this subtitle related to that rate or transportation unless changed or set aside by the Commission or set aside by a court of competent jurisdiction.

(c) When the Commission finds in any proceeding that a rail carrier proposing or defending a rate for transportation has market dominance over the transportation to which the rate applies, it may then determine that rate to be unreasonable if it exceeds a reasonable maximum for that transportation. However, a finding of market dominance does not estab-

lish a presumption that the proposed rate exceeds a reasonable maximum. This subsection does not limit the power or the Commission to suspend a rate under section 10707(c) of this title. However, if the Commission has found that a carrier does not have market dominance over the transportation to which the rate applies, the Commission may suspend an increase in that rate as being in excess of a reasonable maximum for that transportation only if it specifically changes or sets aside its prior determination of market dominance.

(d)(1) In this subsection—

(A) "fixed and variable cost" means all cost incurred by rail carriers in the transportation of freight, but limiting the return on equity capital to a rate equal to the embedded cost of debt.

(B)(i) "cost recovery percentage" means the lowest revenue-variable cost percentage which, if all movements that produced revenues resulting in revenue-variable cost percentages in excess of the cost recovery percentage are deemed to have produced only revenues resulting in the cost recovery percentage, would produce revenues which would be equal, when combined with total revenues produced by all other traffic transported by rail carrier, to the total fixed and variable cost of the transportation of all traffic by rail carrier.

(ii) for purposes of determining the cost recovery percentage only, "revenue-variable cost percentage" means the quotient, expressed as a percentage figure, obtained by dividing the total revenues produced by the transportation of all traffic received by rail carriers for rail transportation by the total variable cost of such transportation.

(2) In making a determination under this section, the Commission shall find that the rail carrier establishing the challenged rate does not have market dominance over the transportation to which the rate applies if such rail carrier proves that the rate charged results in a revenue-variable cost percentage for such transportation that is less than—

(A) 160 percent during the period beginning on the effective date of the Staggers Rail Act of 1980 and ending September 30, 1981;

(B) 165 percent during the period beginning October 1, 1981, and ending September 30, 1982;

(C) 170 percent during the period beginning October 1, 1982, and ending September 30, 1983;

(D) 175 percent or the cost recovery percentage, whichever is less, during the period beginning October 1, 1983, and ending September 30, 1984; and

(E) the cost recovery percentage, during each 12-month period beginning on or after October 1, 1984.

For purposes of subparagraphs (D) and (E) of this paragraph, the cost recovery percentage shall in no event be less than a revenue-variable cost percentage of 170 percent or more than a revenue-variable cost percentage of 180 percent.

(3) For purposes of determining the revenue-variable cost percentage for a particular transportation, variable costs shall be determined pursuant to section 10705a(m)(1) of this title, with adjustments specified by the Commission. A rail carrier may meet its burden of proof under this subsection by establishing its variable costs in accordance with such section 10705a(m)(1), but a shipper may rebut that showing by evidence of such type, and in accordance with such burden of proof, as the Commission shall prescribe.

(4) A finding by the Commission that a rate charged by a rail carrier results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the applicable percentage under paragraph (2) of this subsection does not establish a presumption that (A) such rail carrier has or does not have market dominance over such transportation, or (B) the proposed rate exceeds or does not exceed a reasonable maximum.

(5)(A) Within 180 days after the effective date of the Staggers Rail Act of 1980 and on an annual basis thereafter, the Commission shall determine the cost recovery percentage for the transportation of all traffic received by rail carriers. The Commission shall make such determination after considering each individual revenue-variable cost percentage resulting

from the revenues and costs of a valid and reliable statistical sample of all movements of commodities transported by class I rail carriers during the most recent calendar year for which such information is available.

(B) If, on the basis of calculations under subparagraph (A) of this paragraph, the Commission determines that revenues earned by all class I rail carriers during the previous calendar year do not exceed the fixed and variable cost of such carriers, then the cost recovery percentage for purposes of this section shall be deemed to be equal to the cost recovery percentage last determined by the Commission.

(C) The Commission shall, in its annual report submitted to the Congress under section 10311 of this title, set forth the cost recovery percentage determined for that year under subparagraph (A) of this paragraph.

* * *

§ 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules and practices related to those rates, and (B) if a contract carrier, rules and practices related to these rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commis-

sion finds that filing of actual rates is required in the public interest.

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 shall be stated in money of the United States. A tariff filed by a motor or water contract carrier or by a freight forwarder providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of that chapter, respectively, may not become effective for 30 days after it is filed.

(b)(1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section. The Commission may prescribe specific charges to be identified in a tariff published by a common carrier providing transportation or service subject to its jurisdiction under subchapter I, III, or IV of that chapter, but those tariffs must identify plainly—

(A) the places between which property and passengers will be transported;

(B) terminal, storage, and icing charges (stated separately) if a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter;

(C) terminal charges if a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter III or IV of that chapter;

(D) privileges given and facilities allowed; and

(E) any rules that change, affect, or determine any part of the published rate.

(2) A joint tariff filed by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter shall identify the carriers that are parties to it. The carriers that are parties to a joint tariff, other than the

carrier filing it, must file a concurrence or acceptance of the tariff with the Commission but are not required to file a copy of the tariff. The Commission may prescribe or approve what constitutes a concurrence or acceptance.

(c)(1) When a common carrier providing transportation or service subject to the jurisdiction of the Commission (A) under subchapter I of chapter 105 of this title proposes to change a rate, or (B) under another subchapter of that chapter proposes to change a rate, classification, rule, or practice, the carrier shall publish, file, and keep open for public inspection a notice of the proposed change as required under subsections (a) and (b) of this section.

(2) When a contract carrier providing transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title proposes to establish a new rate or to reduce a rate, directly or by changing a rule or practice related to the rate or the value of service under the rate, the carrier shall publish, file, and keep open for public inspection a notice of the new or reduced rate as required under subsections (a) and (b) of this section.

(3) A notice filed under this subsection shall plainly identify the proposed change or new or reduced rate and indicate its proposed effective date. In the case of a carrier other than a rail carrier, a proposed rate change or a new or reduced rate may not become effective for 30 days after the notice is published, filed, and held open as required under subsections (a) and (b) of this section. In the case of a rail carrier, a proposed rate change resulting in an increased rate or a new rate shall not become effective for 20 days after the notice is published and a proposed rate change resulting in a reduced rate shall not become effective for 10 days after the notice is published, except that a contract authorized under section 10713 of this title shall become effective in accordance with the provisions of such section.

(d)(1) The Commission may reduce the notice period of subsections (a) and (c) of this section if cause exists. The Commission may change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances.

(2) The Commission may prescribe regulations for the simplification of tariffs by carriers providing transportation subject to its jurisdiction under subchapter I of chapter 105 of this title and permit them to change rates, classifications, rules, and practices without filing complete tariffs that cover matter that is not being changed when the Commission finds that action to be consistent with the public interest. Those carriers may publish new tariffs that incorporate changes or plainly indicate the proposed changes in the tariffs then in effect and kept open for public inspection. However, the Commission shall require that all rates of rail carriers and rail rate-making associations be incorporated in their individual tariffs by the end of the 2d year after initial publication of the rate, or by the end of the 2d year after a change in a rate becomes effective, whichever is later. The Commission may extend those periods if cause exists, but if it does, it must send a notice of the extension and a statement of the reasons for the extension to Congress. A rate not incorporated in an individual tariff as required by the Commission is void.

(e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

(f) The Commission may grant relief from this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

(g) The Commission shall streamline and simplify, to the maximum extent practicable, the filing requirements applicable under this section to motor common carriers of property with respect to transportation provided under certificates to which the provisions of section 10922(b)(4)(E) of this title apply and to motor contract carriers of property with respect to transportation provided under permits to which the provisions of section 10923(b)(5) of this title apply.

* * *

§ 11705. Rights and remedies of persons injured by certain carriers

(a) A person injured because a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title does not obey an order of the Commission, except an order for the payment of money, may bring a civil action to enforce that order under this subsection.

(b)(1) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under subchapter IV of chapter 107 of this title.

(2) A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this subtitle.

(3) A common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV of chapter 105 of this title is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

(c)(1) A person may file a complaint with the Commission under section 11701(b) of this title or bring a civil action under subsection (b)(1) or (2) of this section to enforce liability against a common carrier providing transporation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title. A person may begin a proceeding under section 10704 or 10705 of this title to enforce liabilty under subsection (b)(3) of this section by filing a complaint with the Commission under section 11701(b) of this title.

(2) When the Commission makes an award under subsection (b) of this section, the Commission shall order the carrier to pay the amount awarded by a specific date. The Commission may order a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title to pay damages only when the proceeding is on complaint. The person for whose benefit an order of the Commission requiring the payment of money is made may bring a civil action to enforce that order under this paragraph if the carrier does not pay the amount awarded by the date payment was ordered to be made.

(d)(1) When a person begins a civil action under subsection (b) of this section to enforce an order of the Commission requiring the payment of damages by a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title, the text of the order of the Commission must be included in the complaint. In addition to the district courts of the United States, a State court of general jurisdiction having jurisdiction of the parties had jurisdiction to enforce an order under this paragraph. The findings and order of the Commission are competent evidence of the facts stated in them. Trial in a civil action brought in a district court of the United States under this paragraph is in the judicial district (A) in which the plaintiff resides, (B) in which the principal operating office of the carrier is located, (C) if a rail carrier, through which the railroad line of that carrier runs, or (D) if a water carrier, in which a port of call on a route operated by that carrier is located. In a civil action under this

paragraph, the plaintiff is liable for only those costs that accrue on an appeal taken by the plaintiff.

(2) All parties in whose favor the award was made may be joined as plaintiffs in a civil action brought in a district court of the United States under this subsection and all the carriers that are parties to the order awarding damages may be joined as defendants. Trial in the action is in the judicial district in which any one of the plaintiffs could bring the action against any one of the defendants. Process may be served on a defendant at its principal operating office when that defendant is not in the district in which the action is brought. A judgment ordering recovery may be made in favor of any of those plaintiffs against the defendant found to be liable to that plaintiff.

(3) The district court shall award a reasonable attorney's fee as a part of the damages for which a carrier is found liable under this subsection. The district court shall tax and collect that fee as a part of the costs of the action.

§ 11706. Limitation on actions by and against common carriers

(a) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must begin a civil action to recover charges for transportation or service provided by the carrier within 3 years after the claim accrues.

(b) A person must begin a civil action to recover overcharges under section 11705(b)(1) of this title within 3 years after the claim accrues. If that claim is against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title and an election to file a complaint with the Commission is made under section 11705(c)(1), the complaint must be filed within 3 years after the claim accrues.

(c)(1) A person must file a complaint with the Commission to recover damages under section 11705(b)(2) of this title within 2 years after the claim accrues.

(2) A person must begin a civil action to recover damages under section 11705(b)(3) of this title within 2 years after the claim accrues.

(d) The 3-year period under subsection (b) of this section is extended for 6 months from the time written notice is given to the claimant by the carrier of disallowance of any part of the claim specified in the notice if a written claim is given to the carrier within that 3-year period. The 3-year period under subsection (b) of this section and the 2-year period under subsection (c)(1) of this section are each extended for 90 days from the time the carrier begins a civil action under subsection (a) of this section to recover charges related to the same transportation or service, or collects (without beginning a civil action under that subsection) the charge for that transportation or service if that action is begun or collection is made within the appropriate period.

(e) A person must begin a civil action to enforce an order of the Commission against a carrier for the payment of money within one year after the date the order required the money to be paid.

(f) This section applies to transportation for the United States Government. The time limitations under this section are extended, as related to transportation for or on behalf of the United States Government, for 3 years from the date of (1) payment of the rate for the transportation or service involved, (2) subsequent refund for overpayment of that rate, or (3) deduction made under section 244 of title 31, whichever is later.

(g) A claim related to a shipment of property accrues under this section on delivery or tender of delivery by the carrier.

* * *

§ 11901. General civil penalties

(a) Except as otherwise provided in this section, a common carrier providing transportation subject to the jurisdiction of

the Interstate Commerce Commission under subchapter I of chapter 105 of this title, an officer or agent of that carrier or a receiver, trustee, lessee, or agent of one of them, knowingly violating an order of the Commission under this subtitle is liable to the United States Government for a civil penalty of $5,000 for each violation. Liability under this subsection is incurred for each distinct violation. A separate violation occurs for each day the violation continues.

(b) A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, or a receiver or trustee of that carrier, violating a regulation or order of the Commission under section 10761, 10762, 10764, 10765, or 11128(a)(2) or (b) of this title is liable to the United States Government for a civil penalty of $500 for each violation and for $25 for each day the violation continues.

(c) A carrier, receiver, or trustee violating subchapter V of chapter 107 of this title, or a regulation under that subchapter, is liable to the United States Government for a civil penalty of $500 for each violation. A separate violation occurs each day the violation continues.

(d) A person knowingly authorizing, consenting to, or permitting a violation of sections 10901-10907 of this title or of a condition of a certificate or a regulation under any of those sections, is liable to the United States Government for a civil penalty of not more than $5,000.

(e)(1) A carrier, receiver, or operating trustee violating an order or direction of the Commission under section 11123, 11124, 11125, 11127, or 11128(a)(1) of this title is liable to the United States Government for a civil penalty of at least $100 but not more than $500 for each violation and for $50 for each day the violation continues.

(2) A rail carrier, receiver, or operating trustee violating section 11126 of this title is liable to the United States Government for a civil penalty of $100 for each violation. A separate

violation occurs for each car not counted when a car count is required under that section.

(f)(1) A person required under subchapter III of chapter 111 of this title to make, prepare, preserve, or submit to the Commission a record concerning transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title that does not make, prepare, preserve, or submit that record as required under that subchapter, is liable to the United States Government for a civil penalty of $500 for each violation.

(2) A carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, and a lessor, receiver, or trustee of that carrier, violation section 11144(b)(1) of this title, is liable to the United States Government for a civil penalty of $100 for each violation.

(3) A carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, a lessor, receiver, or trustee of that carrier, a person furnishing cars or protective services against heat or cold, and an officer, agent, or employee of one of them, required to make a report to the Commission or answer a question that does not make the report or does not specifically, completely, and truthfully answer the question, is liable to the United States Government for a civil penalty of $100 for each violation.

(4) A separate violation occurs for each day a violation under this subsection continues.

(g) A person required to make a report to the Commission, answer a question, or make, prepare, or preserve a record under this subtitle concerning transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, or an officer, agent, or employee of that person that (1) does not make the report, (2) does not specifically, completely, and truthfully answer the question, (3) does not

make, prepare, or preserve the record in the form and manner prescribed by the Commission, or (4) does not comply with section 10921 of this title, is liable to the United States Government for a civil penalty of not more than $500 for each violation and for not more than $250 for each additional day the violation continues. After the date of enactment of this sentence, no penalties shall be imposed under this subsection for a violation relating to the transportation of household goods. Any such penalties that were imposed prior to such date of enactment shall be collected only in accordance with the provisions of subsection (h) of this section.

(h)(1) Any person required to make a report to the Commission, answer a question, or make, prepare, or preserve a record under this subtitle concerning transportation of household goods subject to jurisdiction of the Commission under subchapter II of chapter 105 of this title, or an officer, agent, or employee of such person, that (A) does not make the report, (B) does not specifically, completely, and truthfully answer the question, (C) does not make, prepare, or preserve the record in the form and manner prescribed by the Commission, or (D) does not comply with section 10921 of this title, is liable to the United States for a civil penalty of not more than $500 for each violation and of not more than $250 for each additional day during which the violation continues. No penalty shall be imposed under this paragraph for any failure to make, prepare, or preserve the record in the form and manner prescribed by the Commission unless the shipper or shippers have suffered harm as a result of such failure.

(2) In determining and negotiating the amount of a civil penalty under this subsection, the degree of culpability, any history of prior such conduct, the degree of harm to shipper or shippers, ability to pay, the effect on ability to do business, whether the shipper has been adequately compensated before institution of the proceeding, and such other matters as fairness may require shall be taken into account.

(h) A person subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, or an officer, agent, or employee of that person, and who is required to comply with section 10921 of this title but does not so comply with respect to the transportation of hazardous wastes as defined by the Environmental Protection Agency pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Congress) shall, in any action brought by the Commission, be liable to the United States for a civil penalty not to exceed $20,000 for each violation.

(i)(1) Subject to the provisions of paragraph (3) this subsection, if a common carrier providing transportation of household goods subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title or a receiver or trustee of such carrier fails or refuses to comply with any regulation issued by the Commission relating to protection of individual shippers, such carrier, receiver, or trustee is liable to the United States for a civil penalty of not more than $1,000 for each violation and of not more than $500 for each additional day during which the violation continues.

(2)(A) If the Commission determines—

(i) That a common carrier providing transportation of household goods subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title or a receiver or trustee of such carrier has failed or refused to comply with a regulation issued by the Commission relating to protection of individual shippers in excess of any performance standard established in such regulation; and

(ii) with respect to each such failure or refusal, that the shipper or shippers have suffered harm as a result of such failure or refusal;

the Commission may, in writing, notify the carrier, receiver, or trustee of its determinations and may elect to assess civil penalties under this paragraph for such failures and refusals in lieu of proceeding under paragraph (1) of this subsection with respect to such failures and refusals. If the Commission elects

to assess civil penalties under this paragraph, such civil penalties may only be assessed after notice and opportunity for a hearing.

(B) Subject to the provisions of paragraph (3) of this subsection, the amount of a civil penalty which may be assessed under this paragraph for a failure or refusal shall not be more than $1,000 for such failure or refusal and $500 for each additional day during which such failure or refusal continues.

(C) Notwithstanding the provisions of section 1336 of title 28, United States Code, a proceeding to enjoin or suspend, in whole or part, an order issued by the Commission assessing one or more civil penalties under this paragraph may only be brought in the United States court of appeals as provided by and in the manner prescribed in chapter 158 of such title.

(3) The amount of a civil penalty which may be assessed under paragraph (1) or (2) of this subsection for a failure or refusal shall not be more than $500 for such failure or refusal and $250 for each additional day during which such failure or refusal continues if, between the time the carrier, receiver, or trustee receives notice from the Commission of such failure or refusal and the commencement of the assessment hearing or trial, as the case may be, the carrier, receiver, or trustee adequately compensates the shipper or shippers, of offers adequate compensation to the shipper or shippers, for the harm they have suffered as a result of such failure or refusal.

(4)(A) No civil penalty may be imposed under this subsection for a failure or refusal to comply with a regulation issued by the Commission relating to protection of individual shippers unless the shipper or shippers have suffered harm as a result of such failure or refusal.

(B) In addition, no civil penalty may be imposed under this subsection for a failure or refusal to comply with a regulation issued by the Commission relating to protection of individual shippers—

(i) if, before receiving notice from the Commission of such failure or refusal, the carrier, receiver, or trustee adequately compensates the shipper or shippers, or offers adequate compensation to the shipper or shippers, for the harm they have suffered as a result of such failure or refusal; or

(ii) in the case of a carrier, receiver, or trustee that does not know or have reason to know that the shipper or shippers have suffered harm as a result of such failure or refusal before receiving notice from the Commission of such failure or refusal, if such carrier, receiver, or trustee adequately compensates the shipper or shippers, or offers adequate compensation to the shipper or shippers, for such harm before commencement under this subsection of the assessment hearing or trial, as the case may be.

(5) In determining and negotiating the amount of a civil penalty under this subsection, the degree of culpability, any history of prior such conduct, the degree of harm to shipper or shippers, ability to pay, the effect on ability to do business, and such other matters as fairness may require shall be taken into account.

(j) Any person that knowingly engages in or knowingly authorizes an agent or other person (1) to falsify documents used in the transportation of household goods subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title which evidence the weight of a shipment, or (2) to charge for accessorial services which are not performed or for which the carrier is not entitled to be compensated in any case in which such services are not reasonably necessary in the safe and adequate movement of the shipment, is liable to the United States for a civil penalty of not more than $2,000 for each violation and of not more than $5,000 for each subsequent violation. Any State may bring a civil action in the United States district courts to compel a person to pay a civil penalty assessed under this subsection.

(k)(1) Trial in a civil action under subsections (a)-(f) of this section is in the judicial district in which the carrier has its principal operating office or in a district through which the railroad of the carrier runs.

(2) Trial in a civil action under subsection (g), (h), (i)(1), or (j) of this section is in the judicial district in which (A) the motor carrier or broker has its principal office, (B) the motor carrier or broker was authorized to provide transportation under this subtitle when the violation occurred, (C) the violation occurred, or (D) the offender is found. Process in the action may be served in the judicial district of which the offender is an inhabitant or in which the offender may be found.

* * *

APPENDIX I

Pertinent Provisions of the Code of Federal Regulations (49 C.F.R.)

* * *

§ 1300.2 Changes to be indicated in tariff or supplement.

(a) *Symbols.* (1) All tariff publications and supplements thereto must indicate changes thereby made in existing rates or charges, rules, regulations or practices, or classifications by use of the following uniform symbols in connection with such changes:

● to indicate reductions.

♦ to denote increases.

▲ to denote changes in wording which result in neither increases nor reductions in charges.

(2) Explanation of such symbols must be provided in the tariff or supplement in which used, and these symbols shall not be used for any other purpose.

(3) When a change of the same character is made in all or in substantially all rates in a tariff or supplement, or a page thereof, that fact and the nature of such change may be indicated in distinctive type at the top of the title page of such issue, or at the top of each page, respectively, in the following manner, "All rates in this issue are increase," or "All rates on this page are reductions except as otherwise provided in connection with the rates." Under this paragraph of the rule a bold-face dot, "•" must be used to symbolize a rate in which no change has been made. This symbol must not be used for any other purpose.

* * *

§ 1300.30 Transmission of publications to subscribers.

(a) Except as otherwise authorized in paragraphs (b) and (d) of this section, one copy of each new tariff, supplement, and loose-leaf page must be transmitted to each (subscriber) thereto by first-class mail (or other means requested in writing by subscriber) not later than the time the copies for official filing are transmitted to the Commission. The letter of transmittal accompanying the copies to the Commission must contain the following certification:

I hereby certify that I have on or before this day sent one copy of each publication listed hereon to each subscriber thereto by first-class mail, or by other means of transmission agreed upon in writing by the subscriber.

Signature of person
transmitting publication(s)

Date

(b) If a new tariff or supplement is filed which in its entirety is published under an authority from this Commission to publish and file without notice or on notice of less than ten days, or if a new loose-leaf page is filed which contains a provision published under an authority from this Commission to publish and file without notice or on notice of less than ten days, paragraph (a) of this section need not be complied with as to such publication if it cannot be or compliance would cause excessive delay, but one copy of such publication must be transmitted to each subscriber thereto by first-class mail (or other means requested in writing by subscriber) within five calendar days, starting with the calender day following that on which the copies for official filing are transmitted to the Commission, and the letter of transmittal to the Commission must contain the following certification:

I hereby certify that I will within five calendar days after today send one copy of each publication listed hereon to each

subscriber thereto by first-class mail, or by other means of transmission agreed upon in writing by the subscriber.

Signature of person
transmitting publication(s)

Date

Included in this exception are supplements issued for the purpose of announcing suspensions made by the Commission, publications (published in the name of a carrier only) announcing adoptions, and publications reproducing service orders.

(c) When copies of different publications are transmitted to the Commission at the same time, some copies of which have been transmitted to subscribers in compliance with paragraph (a) of this section and some of which will be transmitted to subscribers in compliance with paragraph (b) or this section, two letters of transmittal must accompany the copies to the Commission, one complying with paragraph (a) of this section and the other complying with paragraph (b) of this section.

(d) If there are no subscribers to any publication listed on letter of transmittal accompanying the copies for official filing to the Commission, the letter of transmittal must contain the following certification:

I hereby certify that there are no subscribers to the publication(s) listed hereon.

Signature of person
transmitting publication(s)

Date

If copies of different publications are transmitted to the Commission at the same time, some of which are subscribed to and some of which are not, only the provisions of paragraphs (a) or (b) of this section, or both, as the case may be, need be complied with.

(e) Expedited service (when transmitting one copy of each publication) must be provided to each subscriber requesting it. The cost of this service may be passed on to the subscriber.

(f) Carriers and agents shall furnish without delay one copy of any of their tariff publications, effective or published but not yet effective, to any person upon reasonable request therefor at a reasonable charge not to exceed that assessed a subscriber.

(g) As used herein, the term "subscriber" means a party who voluntarily or upon reasonable request is furnished at least one copy of a particular tariff and amendments thereto (including reissues thereof) by the publishing carrier or agent. The term does not, however, pertain to requests for a copy or copies of a tariff without a request for future amendments thereto.

* * *

APPENDIX J

Proposed Rules of Interstate Commerce Commission to Govern Symbolization of Changed Tariff Matter Resulting in Increases

The Interstate Commission proposes to amend 49 C.F.R. §§ 1300, 1303, 1304, 1306, 1307, 1308, and 1310 by adding the following new paragraph to be designated, respectively, as § 1300.2(a)(4), § 1303.4(d)(3), § 1304.2(c), § 1306.5(b)(2), § 1307.5(r)(1), § 1308.2(a) and § 1310.10(f)(5):

> Changes resulting in increases which are not identified by proper symbols shall be considered unlawfully published and filed and therefore invalid and not collectable. In such cases, the lawful provisions will be those which were purportedly superseded. Invalid provisions shall be canceled by publications which shall bring forward, or properly amend, provisions which have remained in effect by reason of invalid publication.

Office-Supreme Court, U.S.
FILED
FEB 14 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-707 and 82-804

In the Supreme Court of the United States

OCTOBER TERM, 1982

ABERDEEN & ROCKFISH RAILROAD COMPANY, ET AL.,
PETITIONERS
v.
UNITED STATES OF AMERICA, ET AL.

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,
PETITIONER
v.
UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

Whether the Interstate Commerce Commission has the authority, in cases where a tariff calling for a rate increase is filed without complying with the Commission's symbolization regulations and that tariff then goes into effect, to invalidate the filing upon discovery of the defect and thereby render the improperly filed tariff void ab initio.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-24b)[1] is reported at 682 F.2d 1092. The decisions of the Interstate Commerce Commission (Pet. App. 1c-67c, 1d-12d, 1e-28e) are reported at 364 I.C.C. 217, 365 I.C.C. 43, and 44 Fed. Reg. 60122, respectively.

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[1] "Pet. App." refers to the appendix in No. 82-707.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1f-2f) was entered on August 9, 1982. A petition for rehearing was denied on September 22, 1982 (Pet. App. 1g-2g). The petition for a writ of certiorari in No. 82-707 was filed on October 22, 1982, and the petition in No. 82-804 was filed on November 12, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Interstate Commerce Act, 49 U.S.C. (& Supp. IV) 1 *et seq.*, carriers establish and change their rates for transportation services by filing rate schedules, known as tariffs, with the Interstate Commerce Commission. The Act requires that newly filed tariffs "plainly identify" any proposed rate change, 49 U.S.C. (Supp. IV) 10762(c)(3), and authorizes the Commission to prescribe the form for filing tariffs, 49 U.S.C. (Supp. IV) 10762(b). The Commission is empowered to reject tariffs that violate the filing regulations. 49 U.S.C. (Supp. IV) 10762(e). Carriers are permitted to collect only the rates specified by tariffs on file, 49 U.S.C. (Supp. IV) 10761, and departure from those filed rates subjects a carrier to civil and criminal liability. 49 U.S.C. (Supp. IV) 11901, 11903.

A rate filed with the Commission generally becomes effective after a waiting period.[2] During this period, the Commission entertains protests against the rate and decides whether to reject it, suspend its effectiveness, investigate it, or permit it to become effective without investigation. See 49 U.S.C. (Supp. IV) 10762(e), 10707, 10708. Unless the

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[2]The waiting period for railroad rates is 20 days (10 days for reductions), 49 U.S.C. (Supp. IV) 10762(c)(3), and motor carrier rates become effective after 30 days, 49 U.S.C. (Supp. IV) 10762(a)(2). The Commission, however, has the power to shorten the waiting period. 49 U.S.C. (Supp. IV) 10762(d)(1).

Commission rejects or suspends the rate during the waiting period, the rate becomes applicable, and carriers must charge that rate and shippers must pay it. The applicable rate nonetheless may be "unlawful" for some reason. See, e.g., Arizona Grocery Co. v. *Atchison, T. & S. F. Ry.*, 284 U.S. 370, 384 (1932). For example, an applicable rate may later be determined to be unreasonably high, in which case the Act makes the carrier liable to refund that part of the rate found to be unreasonable. 49 U.S.C. (Supp. IV) 10707(d)(1), 10708(b), 11705(b)(2) and (3).

2. One of the Commission's filing regulations requires that all tariffs bear appropriate symbols indicating whether the tariff increases, decreases, or causes neither an increase nor decrease in existing rates. 49 C.F.R. 1300.2(a)(1). Because the tariffs are "long and detailed" (Pet. App. 23b), these symbols are necessary in order to notify tariff users of a proposed increase or other change so that they can evaluate those changes and, if they desire, timely protest them. See *id.* at 3b; 44 Fed. Reg. 60123 (1979). Until 1979, the Commission examined every filing for obvious defects (including symbolization errors) prior to the tariff's effective date. Tariffs submitted with incorrect symbols were rejected, and the carrier was required to refile the tariff in acceptable form. Because this preexamination procedure provided safeguards against the possibility that a tariff would become effective without notice that a rate increase was being proposed, the Commission generally imposed no penalty on those rare occasions when a symbolization error was discovered after a tariff had gone into effect. Rather, the Commission simply advised the carrier of the error and requested that it take more care in the future. See Pet. App. 3b.

When budget reductions forced the Commission to reallocate its scarce resources, however, the Commission determined that it could no longer maintain sufficient tariff

examiners to preexamine every filing. Accordingly, in October 1979, the Commission began reviewing only a random sample of tariff filings.[3] At the same time, the Commission proposed the symbolization rules at issue here as Ex Parte No. 370 (Pet. App. 5e-7e).[4] In the notice of proposed rulemaking, the Commission stated that it expected that some of the symbolization errors that previously would have been discovered by preexamination would now escape detection under the random sampling procedure (*id.* at 6e). Focusing its attention on rate increases, the Commission explained that accurate symbols enable tariff users to discover and evaluate rate changes, which is "vital to tariff users' rights to timely protest proposed tariff changes" (*id.* at 5e). If users could not rely on accurate symbols, they would "be burdened with the onerous chore of comparing proposed tariff filings word-for-word or figure-for-figure against existing tariff matter" (*id.* at 6e). To protect tariff users against deprivation by mis-symbolization of their right to protest rate increases, the Commission proposed to make improperly symbolized rate increases invalid and uncollectable and to allow shippers to recover amounts already paid as overcharges.[5] Pending properly symbolized refiling of the invalidated tariffs, the applicable rates would be the ones in existence before the improperly symbolized tariff was filed. The proposed rules also provided that disagreements on the factual question

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[3]Currently, the Commission examines only the title pages of tariff filings.

[4]Apart from the symbolization requirements, the proposal and rule ultimately promulgated also contained other new tariff rules that are not in issue here.

[5]Overcharges are amounts that exceed the applicable rate set forth in a tariff filed under the Act's tariff filing requirements. 49 U.S.C. (Supp. IV) 11705(b)(1). See Pet. App. 18b-20b.

whether a tariff provision had been improperly symbolized would be resolved by the Commission (Pet. App. 7e).[6]

After considering comments on its proposal, the Commission adopted the proposed symbolization rules without change on August 14, 1980 (Pet. App. 10c-16c, 57c). The Commission explained that the tremendous increase in the number of tariff filings,[7] combined with budgetary and personnel constraints, justified the new rules (*id.* at 10c-11c). The Commission rejected the suggestion of some commenters that improperly symbolized increases not be treated as overcharges (*id.* at 13c-14c). The Commission stressed that it no longer was in a position itself to prevent improperly symbolized rate increases from becoming effective (*id.* at 11c), and therefore it was necessary to increase the emphasis on the submission of properly symbolized tariffs (*id.* at 14c). It noted that the tariff publisher ordinarily can determine easily whether a particular tariff change results in an increase, and further stated that tariff publishers uncertain about the effect of a particular tariff change could seek Special Permission authority to waive the symbolization requirements (*id.* at 15c). Finally, the Commission concluded that the special potential for harm to tariff users justified invalidating improperly symbolized increases but not reductions (*ibid.*). The Commission subsequently denied petitions for reconsideration of the symbolization rules (Pet. App. 4d).

3. The court of appeals affirmed the validity of the symbolization rules in all respects (Pet. App. 1b-24b). The court first held that the rules do not exceed the Commission's statutory authority (*id.* at 5b-20b). The court explained that

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[6]The Act establishes formal complaint procedures for overcharge disputes. 49 U.S.C. (Supp. IV) 11701.

[7]In fiscal year 1979, the Commission received more than 100,000 more tariff publications than in fiscal year 1978 (Pet. App. 11c).

Section 10762 of the Act permits the Commission to reject a tariff that has gone into effect but was not filed in the prescribed format, noting that the section is not limited to "proposed" or "ineffective" tariffs and places no time constraints on the power to reject (*id.* at 6b-11b).[8] The court then upheld the Commission's authority to impose overcharge liability for improperly symbolized increases (*id.* at 11b-20b). Drawing a distinction between "applicable" rates (those that have been filed and accepted by the Commission) and "lawful" rates (those filed in accordance with the Act and Commission regulations), the court concluded that shippers always must pay the "applicable" rate, but they are entitled to recover overcharges if the Commission later detects a defect that makes the rate unlawful (*id.* at 16b-18b).

The court also rejected the argument that the new rules are arbitrary and capricious (Pet. App. 20b-23b). The court explained that the Commission "can no longer afford to police the thousands of rate changes that are published weekly" and therefore "must shift the burden of ensuring exact compliance with symbolization requirements to the carriers themselves" (*id.* at 22b). In these circumstances, the court concluded that the Commission was "not unreasonable in concluding that overcharge liability is the most appropriate means of encouraging the carriers to check and recheck thoroughly all tariff revisions," particularly since each carrier has the power to prevent any recovery against it simply by carefully carrying out its own legal obligation to put the correct symbols on its rate increases (*id.* at 23b). Finally, the court rejected the claim that imposition of

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[8]The court recognized (Pet. App. 11b n.7) that the rules were promulgated as a means of enforcing the symbolization requirements issued by the Commission under Section 10762(b)(1), rather than pursuant to the Commission's authority to reject tariffs in Section 10762(e).

overcharge liability would be particularly unfair in certain hypothetical situations, explaining that the ordering of a refund is discretionary and the Commission retains the right to fashion relief appropriate to the particular circumstances (*id.* at 23b-24b).

DISCUSSION

Petitioners contend that the Commission lacked the authority to promulgate rules that invalidate and treat as overcharges rate increases that have already gone into effect because they do not conform to the Commission's filing requirements. We believe that the court of appeals correctly rejected this contention. The decision below conflicts, however, with that of another court of appeals, and the resolution of the question presented here is of great practical importance. Accordingly, we do not oppose the grant of these petitions for certiorari.

1. In Ex Parte No. 297 (Sub. No. 5), *Motor Carrier Rate Bureaus - Implementation of Pub. L. 96-296,* 46 Fed. Reg. 30092 (1981), the Commission established new rules to implement statutory amendments in connection with motor carrier rate bureau agreements.[9] As pertinent here, the Commission ruled that it will enforce the rate bureau provisions by rejecting tariffs where there is proof of significant violations of an approved agreement. 46 Fed. Reg. 30105 (1981). In *American Trucking Association* v. *United States,* 688 F.2d 1337 (1982), the Eleventh Circuit struck down this aspect of the Commission's new rules. 688 F.2d at

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[9]Since 1948, members of motor carrier bureaus have enjoyed antitrust immunity for collective ratemaking. This immunity is obtained by submitting a rate bureau agreement to the Commission for its approval and acting in conformity with the terms of the agreement. See 49 U.S.C. (Supp. IV) 10706(b); *Motor Carriers Traffic Association* v. *United States,* 559 F.2d 1251, 1253-1254 (4th Cir.), cert. denied, 435 U.S. 1006 (1977).

1352-1356.[10] The court held that rejection of a tariff after it has become effective is in conflict with the underlying statute and thus beyond the Commission's authority. *Id.* at 1355. The court stated that when a filed and effective tariff is found to be unlawful, the Commission must prescribe the proper rate and that liability for *damages* (as distinguished from overcharges) may then arise (*id.* at 1354). However, once a tariff has become effective, the carrier may not be ordered to refund, as an overcharge, the difference between the rates paid and the former tariff (*id.* at 1355).

Although it deals with a different Commission rule, the Eleventh Circuit's decision in *American Trucking Association* is irreconcilable with the decision below.[11] The Eleventh Circuit has held that the Commission is simply without power to create overcharge liability by invalidating ab initio a tariff once it has gone into effect. It is therefore clear that the Commission's symbolization rules upheld by the court below, which permit the Commission to invalidate and treat as an overcharge a missymbolized rate increase that has

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[10]With the exception of one portion of the rules held invalid for failure to comply with notice and comment procedures, the other portions of the rules not pertinent here were upheld. See 688 F.2d at 1340-1352.

[11]The Eleventh Circuit previously had held in *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 676 F.2d 1374 (1982), that the Commission lacked authority to reject, on the basis of informal proceedings before the Tariff Integrity Board, an improperly published tariff that had gone into effect. The court had reserved the question whether the Commission could exercise that authority through formal procedures (*id.* at 1379 n.14), and the court below distinguished *Southern Motor Carriers* on that basis (see Pet. App. 11b n.6). In *American Trucking Association*, however, the Eleventh Circuit makes it clear that it does not recognize the Commission's authority to reject tariffs that have become effective, even through formal procedures. 688 F.2d at 1354.

already gone into effect, would be struck down by the Eleventh Circuit.[12]

The confusion in the lower courts over the Commission's power to reject tariffs after they have gone into effect is not confined to these two circuits. In promulgating the symbolization rules, the Commission cited (see Pet. App. 12c-13c, 6e-7e) the Ninth Circuit's decision in *Chicago, M., St. P. & P. R.R.* v. *Alouette Peat Products, Ltd.*, 253 F.2d 449 (1957), in which the court upheld overcharge liability where an effective tariff was unlawfully established because the carrier failed to satisfy the 30-day notice requirement. This aspect of *Alouette* has been criticized, however, both in *American Trucking Association* (688 F.2d at 1355-1356) and in *Genstar Chemical, Ltd.* v. *ICC*, 665 F.2d 1304, 1308-1309 (D.C. Cir. 1981), cert. denied, 456 U.S. 905 (1982), which held that a defect in a tariff does not necessarily render the tariff a nullity and create overcharge liability. See also *Providence & W. R.R.* v. *United States*, 666 F.2d 736, 744 (1st Cir. 1981).

It is important that the Court resolve at this time the conflict in the circuits concerning the Commission's tariff rejection authority. The symbolization rules at issue here are an integral part of the Commission's program for effective enforcement of the tariff provisions that form the core of the Interstate Commerce Act. Tariffs give notice to shippers about rate levels, and symbols provide the only practical way for shippers to learn of rate increases in time to exercise their statutory right to protest and seek

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[12]The United States and the Commission are planning to seek certiorari in the *American Trucking Association* case. Accordingly, we believe it would be appropriate for the Court to defer consideration of these petitions until the petition in *American Trucking Association* is filed, so that it may consider the cases together.

suspension of those increased rates.[13] After careful consideration, the Commission has determined that the tariff rejection rule is an appropriate and fair tool for ensuring the continued reliability of tariff symbols, given the practical need to shift the burden of monitoring symbolization to the carriers who file the tariffs. The question of the validity of these rules potentially touches on thousands of rate changes filed each year, involving thousands of shippers, millions of freight movements, and large amounts of money. The existing situation in which the rule is effective in some circuits and not in others is simply intolerable. Accordingly, we ask the Court to grant certiorari to resolve the validity of the symbolization rules and to end uncertainty about the Commission's tariff rejection authority.

2. Although we do not oppose the grant of these petitions for certiorari, we believe that the court of appeals correctly upheld the Commission's symbolization rules. As the court of appeals explained (Pet. App. 6b-11b), the Act does not limit the Commission's rejection power to tariffs that have not yet gone into effect. A tariff that has gone into effect establishes the applicable rate for all shippers and carriers. But if that rate turns out to be unlawful because the tariff was improperly filed, the statute does not prohibit the Commission from treating the unlawful increase as an overcharge (*id.* at 11b-20b).[14]

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[13]The notice requirement adverted to by petitioners (82-707 Pet. 3) simply provides notice that a tariff change is being proposed. It does not take the place of symbolization because, without appropriate symbols, there is often no simple way for a tariff user to determine whether the proposed tariff changes involve increases.

[14]Petitioners' fears (see 82-707 Pet. 20) that carriers automatically will be subjected to "tens of millions of dollars" of absolute liability if shippers wait three years before calling attention to symbolization errors are unfounded. As the court of appeals stated (Pet. App. 23b-24b), the ordering of an overcharge refund is discretionary, and the

Petitioners contend (82-707 Pet. 14-18; 82-804 Pet. 15) that the decision below conflicts with this Court's decision in *Davis* v. *Portland Seed Co.*, 264 U.S. 403 (1924). That case, however, did not address the situation presented here. In *Davis*, a shipper had paid the lawful rate for shipping a commodity between two points. The carrier, however, had also published a lower rate for a longer haul including those points without obtaining the required permission from the Commission to charge less for the longer haul than for the shorter haul. The shipper argued that the low rate for the longer haul should automatically have become the maximum rate for all shorter hauls along that route and hence that it was entitled to recovery for overcharges. The Court rejected that contention, explaining that "mere publication of the forbidden lower rate did not wholly efface the [properly published] higher intermediate one from the schedule and substitute for all purposes the lower one" (264 U.S. at 424-425), and that the shipper was limited to a damages remedy. That holding does not extend to the instant situation where shippers would have paid the very "forbidden" rate published in violation of the Commission's filing requirements. Further, here it is the Commission, through a duly promulgated regulation, that seeks to invalidate the rate; in *Davis* shippers sought judicial invalidation of the higher rate in contravention of the Commission's rules.[15]

Commission retains the right to fashion relief appropriate to the circumstances. In a recent decision (App., *infra*, 1a), the Commission has confirmed its agreement with this statement, explaining that there will not be "automatic liability for overcharges every time it is determined that a [sic] increase was improperly symbolized," and that "the rules will be applied on a case-by-case basis * * *."

[15] In *Berwind-White Coal Mining Co.* v. *Chicago & E. R.R.*, 235 U.S. 371, 375 (1914), the Court simply held that the alleged informalities in the tariff filing were not grounds for invalidation of the tariff.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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DOJ-1983-02

APPENDIX

INTERSTATE COMMERCE COMMISSION

DECISION

EX PARTE NO. 370

TARIFF IMPROVEMENT

Decided: December 29, 1982

[Service Date: Jan. 17, 1983]

The Ex Parte No. 370, *Tariff Improvement* rules pertaining to improperly symbolized increases have been affirmed by the United States Court of Appeals for the Fifth Circuit. *Aberdeen and Rockfish Railroad Company, et al.* v. *United States of America, et al.*, 682 F.2d 1092 (5th Cir. 1982), petitions for certiorari pending.[1]

We continue to believe that these rules are the most effective means to insure the accuracy of the symbols used in tariff filings. However, in accordance with the court's holding that the ordering of refunds remains discretionary and that the Commission retains the right to fashion relief appropriate to individual circumstances, 682 F.2d at 1105, we want to make clear that Ex Parte No. 370 will not result in automatic liability for overcharges every time it is determined that a [sic] increase was improperly symbolized. Rather, the rules will be applied on a case-by-case basis with the possibility that shipper recovery could equal the difference between the missymbolized rate and the prior rate. *See*, No. 37146, *Transit on Wheat Between Reshipping Point and Destination*, served July 29, 1982, and the *Insulating Materials* case (3641 [sic] I.C.C. 559, 683 F.2d 533).

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[1]No. 82-707, *Aberdeen & Rockfish Railroad Company, et al.* v. *United States, et al.*; No. 82-804, *National Motor Freight Traffic Association Inc.* v. *United States of America, et al.*

The Ex Parte No. 370 symbolization rules have never gone into effect because they were stayed by the Fifth Circuit pending judicial review. The Fifth Circuit, however, has denied the railroad's petition for stay pending the filing of a petition for certiorari. Accordingly, these rules will go into effect 30 days from the date of service of this decision.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Sterrett, Andre, Simmons, and Gradison. Vice Chairman Gilliam and Commissioner Andre were absent and did not participate.

JAMES H. BAYNE
Acting Secretary

(SEAL)